82-561

Docket No.

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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1982

JESSE J. JOHNSON
Petitioner

vs

CLIFFORD ALEXANDER, JR.,
in his official capacity as Secretary of the Army;
The United States Department of the Army,
and his agents, assigns and successors in office.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JESSE J. JOHNSON
41 Cornelius Drive
Hampton, VA 23666
804-838-1244
PETITIONER, PRO SE

QUESTIONS PRESENTED

1. Whether Norfolk federal District Court Judge Richard B. Kellam who displays upon the wall of his chamber in a federal tax supported building a picture of Robert E. Lee with cross confederate flags of the Confederate States of America which fought a war to protect "...the institution of slavery..." and "for...the right to property in Negro slaves..." subjected petitioner, a Black citizen and an involuntarily retired federal government employee from Fort Eustis, Virginia to inherent violations of due process under the 5th amendment to the U. S. Constitution and to inherent violations of due process and unequal protection under the 13th, 14th and 15th amendments of the U. S. Constitution wherein he denied petitioner promotion to Education Specialist GS 1710-12 and denied injunctive relief.

(Petitioner does not remember seeing a picture of the U. S. flag in the judge's chamber.)

2. Whether appointing U. S. Federal District Judge Richard B. Kellam who displays unlawfully the picture of Robert E. Lee on cross confederate flags in his chamber in a federal tax-supported building in the District Court, Norfolk Division, in Virginia is one of the reasons petitioner was denied promotion to Education Specialist GS 1710-12 and whether this subjected petitioner to inherent violations of due process under the 5th and 14th U. S. constitutional amendments and to inherently unequal protection under the 13th, 14th and 15th amendments of the U. S. Constitution.

3. Whether not appointing any Black federal District judges since 1789 and/or more impartial white judges

by U. S. Senators in Virginia has subjected the Black petitioner to continuing, systematic, intentional race discrimination for 13 years; denied promotions, transfers, human dignity and injunctive relief for 13 years and subjected petitioner to inherent violations of due process under the 5th and 14th amendments of the U. S. Constitution and to unequal protection under the 13th, 14th and 15th amendments to the U. S. Constitution.

4. Whether the continuous denial of injunctive relief by the District Court, Eastern District of Virginia, by the Civil Service Commission, by the Equal Employment Opportunity Commission and by the Secretary of the Army, his agents and assigns to prevent continuous intentional, systematic race discrimination daily for 13 years against the Black petitioner, subjected him to

inherent violations of due process under the 5th and 14th amendments and inherently unequal protection under the 13th and 14th amendments of the U. S. Constitution and whether this denial was one of the reasons petitioner was not promoted to Education Specialist GS 1710-12, nor to Equal Employment Opportunity Officer GS 160-12 in 1976.

5. Whether the Federal District Court, Eastern District of Virginia, Norfolk Division, or the Fourth Circuit Court should require the Secretary of the Army to promote petitioner to Education Specialist GS 1710-12 or to Equal Employment Opportunity Officer, GS 160-12 or equivalent, under authority of Shaw vs Library of Congress without a formal finding of race discrimination (F Supp 479, 945-950, US DC, DC) or by such authority as exists by law.

6. Whether the court below

denied petitioner due process of law and denied equal protection guaranteed by the U. S. Constitution when it decided that petitioner failed to establish a prima facie case of racial discrimination against petitioner in violation of Title VII, 42 U.S.C. 2000e et seq, conforming to the standard of McDonald Douglas v. Green.

7. Whether the District Court made reversible error in accepting a surprise, undocumented, rigged allegation, before administrative exhaustion, of petitioner's alleged napping in office by hostile discriminating witnesses to deny petitioner's promotion to Education Specialist GS 1710-12 in violation of petitioner's rights under due process, equal protection under the 5th and 14th amendments of the U. S. Constitution. No witness had ever made such a verbal nor written allegation against petitio-

ner in 13 years, as required by the Army's own regulations. (CFR USC 5 Sect 7501 et Seq). (Fort Eustis Regulations TCFE 690-1 Chap 7, Sect IX and X.) NOTE: By the term inherent, petitioner means that due to his Black race, he inherited before, at, and since birth certain constitutional inequalities as a badge of slavery and that this inheritance has helped to deny petitioner equality of opportunity in promotions, injunctive relief, human dignity and inequality in all phases of life.

8. Whether petitioner who was forced to involuntarily retire in July 1980 from federal employment due to extreme, continuous, systematic, intentional and near-violent race discrimination at Fort Eustis, Virginia can now amend his original complaint of February 1980 to include paragraph 21 again so as to revive the allegation of compensatory

and punitive damages, back pay, and promotion under USC 42 Section 1981 and 1982 without being barred by Brown v. General Service Administration (425 US 820 (1976) which decided exclusive jurisdiction of Title VII for federal employees. Petitioner is now in the private sector.

9. Whether Judge Kellam's opinion and order in this case, due to bias and prejudice, so parallels the many deliberate mistatements of facts, distortions, and clear reversible abuses of discretion, etc., by the same court in 1972-76 so much so that it proves a racially biased and prejudiced pattern by the federal District Court, Norfolk Division, intentionally and continually engaging in practices, and abuses in the administration of Civil justice that deprives petitioner of his rights under the 5th, 13th, 14th and 15th amendments

of the U.S. Constitution thereby continually and intentionally denying petitioner injunctive relief, promotions, due process, and equal protection which resulted in the destruction of petitioner's career and emotional health and tranquility.

LIST OF ALL PARTIES

1. JESSE J. JOHNSON, Petitioner
2. CLIFFORD ALEXANDER, JR., As Secretary of the Army, the U.S. Department of the Army, and his agents, assigns and successors in office, Respondent

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TABLE OF AUTHORITIES

Alexander Gardner v Denver (415 US at 36, 48-49, 56 (1974)

Brown v Board of Education of Topeka Kansas (99 L. Ed. Oct 1954 term U.S. 348-349, 1083)

Brown v GSA 425 U.S. 820 1976.

Day v Matther 530 F 2d 1083 (DC Cir. 1976)

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Finch v Wallberg Dredging Co (1955) 76 Idaho 246, 281 p. 2d 136, 48ALR 2d Ct. 1150

Francis Haines v Otto J. Kench et al 404 US 519. 30 Led 2d 652, 92 S. Ct.963

Furnco Construction Corporation v Waters 438 U.S. 567 98 S. Ct. 2943 (1978)

Gibson v Mississippi 162 US 565, 591

Hill v Western Electric Co., Inc. 596 F 2d 99, 104 (4th Cir. 1979)

International Brotherhood of Teamsters v United States 431 US 324. 358 97 S. Ct. 1843 1866 (1977)

John Punch's Case in Virginia (July 1640) (Judicial Cases concerning American Slavery. H. T. Catteral)

Johnson v. Hampton 452 F Supp 1 (1977) (Petitioner's Personnel Case, 1977)

Joseph L. Jones et al v Alfred H. Mayer Co. et al 88 S. Ct. 2186 392 US 409; 20 Led 2d 1189, 1968

McDonald Douglas Corp. v Green 411 US 792 (1973)

Shaw v Library of Congress (F Supp 479, 945 950, USDC, DC 1980)

Slaughter House Cases, 16 Wall. 36 (1873)

Steele v Louisville and Nashville Railroad Co. 323 US 192, 198-199

Strauder v West Virginia 100 US, 300, 307-308 (1879)

US Supreme Court Reports 14 L ed 2d (381 US 131) (L. W. Holt v. Virginia)

US Supreme Court Reports 40 3 US 212, 29 L ed 423, 91 S. Ct. 1778 (R. Johnson v. Mississippi)

US Supreme Court Reports 30 L ed 708, 92 S. Ct. 659, 404 US 553 (L. Little v North Carolina)

US v Scivto 101 S. Ct. 568

US Fansansico v Legal Aid Society of San Diego Inc. CA Cal. 563-F 2d 1324

Virginia v Rines, 100 US 313, 318 (1879) Ex Parte, Virginia 100, US 339, 344-345 (1879) 25 L ed 676 (1880)

Williamson v Bethlehem Steel Corp. 468 F 2d 1201 (2nd Cir) 411 US 911 (1973)

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit affirmed the judgement below on the reasoning of the District Court for the Eastern District of Virginia, Norfolk Division, on April 20, 1982 (App. C). The District Court decision is App. L. Petition for rehearing denied on May 28, 1982 (App. D).

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was decided on April 20, 1982 (App. C). Rehearing was denied on 28 May 1982 (App. D). Petitioner was granted a 30-day extension of time by the Supreme Court of the U. S. (App. A and B). This timely petition was filed on 24 September 1982. Jurisdiction of the court: USC.28 Section 1254. Final decision of district courts.

CONSTITUTIONAL PROVISIONS INVOLVED:
UNITED STATES CONSTITUTION,
AMENDMENT FIVE:

1...No person shall be deprived of life, liberty, or property, without due process of law; ...nor without just compensation.

2. U. S. Constitution, thirteenth:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

3. U. S. Constitution fourteen, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. U. S. Constitution, fifteen, Section 1:

The right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of Servitude.

STATUTES

Civil Rights Act of 1964, as amended, by the Equal Employment Opportunity Act of 1972, 42 US Sct 2000e et seq. (Title VII, Section 706, and 717 Injunctive Relief)

5 CFR Administrative Procedures Act

5 CFR Grievance Procedures, Section 5701 et seq

28 USC, Section 144

28 USC Mandamus Act, Sect. 1361

28 USC Tucker Act 1346

29 CFR, Uniform Guidelines of Employee Selection Procedures (1978), Section 1607

42 USC, US Civil Rights Act of 1866, Section 1981

EXECUTIVE ORDERS

Executive Orders 11246, 11478, and 11590

REGULATIONS

Federal Personnel Manual, Chapter 335 (Promotion Regulations)

Code of Fed. Regulation 713, Equal Employment Opportunity Regulations (Army)

Fort Eustis Civilian Personnel Regulations TCFE 690-1 Chapter 7, Section IX and X

MISCELLANEOUS

CORPUS JURIS SECUNDUM Vol 48A, p 728, Section 108

American Law Reports annotated 48 ALR at 1166

A Study of Judicial Review in Virginia 1789-1928 by M. V. Nelson, Ph.D. 1947, Columbia University Press

H. R. Reports, No. 9 2-238 92d Congress 1st Session at 24 (1971)

S. Report No. 1-15, 92nd Congress 1st Session at 5, (1971)

A History of Virginia Conventions by J. N. Brenaman. Chapter on Debates 1901-02. pp. 91 ff. pp 117-307 (J. L. Hill Press, Richmond, VA 1902)

Judicial Cases Concerning American Slavery and the Negro. Carnegie Institute, Washington, D. C. 1926-27 by H. T. Catteral

Judicial Performance in the Fifth Circuit 73, Yale Law Journal 90 (1963)

Judicature, the Journal of American Judicature Society (May 1979, vol. 62 No. 10) The Senate and the Selection of Federal Judges (Article)

STATEMENT OF THE CASE

1. The petitioner seeks review of a decision of April 20, 1982, by the United States Court of Appeals for the Fourth Circuit, Richmond, Virginia. This decision affirmed the judgement below of 18 December 1980 by the United States District Court for the Eastern District of Virginia, Norfolk Division. (App. L)

2. A timely petition for rehearing was filed on 3 May 1982. Denied on 28 May 1982. (App. D)

3. This court has jurisdiction to review the judgement of the Court of Appeals by writ of certiorari under 28 USC Sect. 1254.

4. The jurisdiction of the District Court was invoked under Title VII of the Act of Congress known as "The Civil Rights Act of 1964" as amended by the

"Equal Employment Opportunity Act of 1972," 42 USC, Section 2000e et Seq, Section 706 and 717 of said Title VII providing for injunctive declaratory and other relief against racial discrimination in federal employment due to race; and Title 42 USC, Sect. 1981 and 1982.

It is also, under the fifth, the thirteenth and fourteenth and fifteenth amendments to the U.S. Constitution: Executive Order #11590 and as alleged in pro se complaint of 28 February 1980, including the Back Pay Act, and Administrative Procedures Act.

5. Petitioner applied for promotion to GS-12.About 10 years preceding his applications for promotion, at Fort Eustis, Virginia, to GS-12, petitioner had been employed at Fort Eustis, Virginia as Education Specialist GS 1710-09 and 11 in vacancy #300-76, with discriminatory exceptions. His duties

were centered on writing correspondence courses for home study by military service persons. Petitioner had also distinguished himself as a publisher of 6 books (12 editions). He had taught CCC camp boys in the education field in Michigan about 3 years; served nearly four years with military research in the Army; nearly 12 years in part-time legally related duties in the Army; three years as Assistant Professor of Military Science and Tactics at ROTC, Virginia State College, Petersburg, VA, and nearly three years with ROTC at Hampton Institute, VA where he retired in October 1962, and worked at Hampton Institute as a civilian nearly 5 years.

In addition, petitioner had been invited to speak to 1000 West Point cadets; testified before a Presidential Congressional Defense Manpower Commission in Washington, D. C. about four

times; spoke at educational institutions and later at the Army War College. Recently he has been filmed in a military documentary for national television. All the above was because of petitioner's books or military history. In addition, he had earned an AB degree, a MA degree in Education and an LLB degree in law by extension (correspondence) study for 3 years, while in the Army; a series of short military and civilian courses; and nearly 12 years Reserve Officers correspondence courses. He entered the Army as a private in October 1942 and retired as a Lieutenant Colonel in October 1962 (20 years) as one of less than 40 Black retired Lieutenant Colonels as of 1962 in all U. S. history.

Petitioner had a total of 30 years job-related training and experiences prior to application for promotion to GS-12 as a writer. Mr. Van Deren, (John, he) who

was promoted, had 1½ years with Civil Service, without any military experiences or job-related writing experiences. He was hired from a civilian education job. (See petitioner's personnel file as Agreed Exhibit #1 in tne record.

CIVIL SERVICE COMMISSION'S PROGRAM IMPEDED EQUAL EMPLOYMENT OPPORTUNITY; CONGRESS SAID; PETITIONER SUFFERED

6. The Civil Service Commission Equal Employment Opportunity practices, customs, and usages were "woefully inadequate," Congress said, between the 1890s and about January 1979, at which time EEO responsibilities were transferred to the Equal Employment Opportunity Commission (EEOC). Petitioner was denied relief under the CSC's inadequate policies between February 1966 and January 1979. The House Committee on Education and Labor reported, among

74. Whereas the central issue in this federal action is unconstitutional, intentional and systematic denial of promotion to Education Specialist GS 1710-12 in about January 1977 in vacancy 300-76 at Fort Eustis, Virginia due to race, violations of due process and equal protection, the promotion issue is inextricably interwoven, inseparably and unmistakably linked to unconstitutional past, continuing, systematic, intentional race discrimination, denial of injunctive relief and denial of promotions by the Norfolk federal District Court, tne Fourth Circuit Court, the Secretary of the Army, the Civil Service Commission, and the Equal Employment Opportunity Commission, and the Equal Employment Opportunity Commission for 13 years; and due to the denial or restriction of Black citizens from the general political life of Virginia, the appointment of

Conservative federal judges by the president of the United States, with the advice and consent of conservative senators from Virginia. The word, conservative, in this action, means that Black citizens and many white citizens' rights interests, sentiments, and views have not been and are not represented in the state-controlled voting procedures which selects federal judges. It is said that Virginia has the second lowest percentage of registered voters in the United States (Census Reports 1970, 1980).

.8. Defendants were found guilty of race discrimination in November 1972. As a result, he was reinstated from discriminatory RIF GS-07 to GS-11 and separation of nearly four years. However, defendants continued with increased retaliatory race discrimination on the first date of reinstatement and continued to date of forced retirement in

July 1980.

9. Petitioner was forced to complain every month in 1973 to Mr. Oben Johnson, Equal Employment Opportunity Officer, without relief; so, in January and February 1974 he was forced to reinstate the race discrimination complaint of 1972 due to contractual violations of agreement of January 1973 and continuing race discrimination which lasted until forced to involuntarily retire in July 1980. No person in authority would stop the daily discrimination to forced retirement in July 80.

REASONS FOR GRANTING THE WRIT

I. ARGUMENT FOR QUESTION #1

1. WHETHER FEDERAL DISTRICT COURT JUDGE RICHARD B. KELLAM WHO DISPLAYS UPON THE WALL OF HIS CHAMBER A PICTURE OF ROBERT E. LEE WITH CROSS CONFEDERATE FLAGS OF THE CONFEDERATE STATES OF AMERICA WHICH FOUGHT TO PROTECT "...THE INSTITUTION

OF SLAVERY..." AND "FOR...THE RIGHT TO PROPERTY IN NEGRO SLAVES..." SUBJECTED PETITIONER, A BLACK EMPLOYEE WHO INVOLUNTARILY RETIRED, TO INHERENT VIOLATIONS OF DUE PROCESS, EQUAL PROTECTION AND JUSTICE UNDER THE 5th, 13th, 14th and 15th AMENDMENTS TO THE U. S. CONSTITUTION WHEREIN PETITIONER WAS DENIED PROMOTION TO GS-12 AND DENIED INJUNCTIVE RELIEF.

(Brown v. Board of Education of Topeka, Kansas) (99 Law Ed. Oct 1954 term. U.S. 348-31-9, 1083) separate but equal"... educational facilities are "inherently unequal." Petitioner inherited certain judicial inequalities due to the badge of slavery.

2. In 1896, the Supreme Court stated... "...the constitution of the United States...forbids, so far as Civil and political rights are concerned, discrimination by the General Government or

by the state, against citizens because of race. (Gibson v Miss. 162 US 565, 591. Steels v Louisville and Nashville Railroad Co., 323 US 192 198-199.) Petitioner has suffered the Army's and CSC's permissiveness and discrimination for 13 years.

3. All racial discrimination is prohibited under the 13th amendment of the U.S. Constitution (Joseph L. Jones et al v. Alfred H. Mayer Col, et al, 392 US 409, 20 L. Ed. 2d, 1189, 1968) (88 S.C. 2186).

4. A flag is and has been for centuries a symbol of a source of inspiration; an inner expression of our feelings, attitudes, cultural ideals, and our preferential symbol for our national personality. The confederate symbol of slavery is void, unlawful and has no place under the national constitution and national personality nor in the

hearts or courts of the state or federal governments.

5. The Certiorari should be granted because the Court below had decided a question relating to the promotion of a Black federal employee in a way in which it conflicts with applicable decisions of this court in the midst of continuing bias and prejudice of the court below and of the Army.

6. The Supreme Court stated that discretion must be exercised in light of the large objective of Civil Rights Act (Hecht v. Bowles 321, US 321 331 (1944) (Albermarle Paper v Moody 422 US 405, 416 (1975).

7. Race discrimination...for several hundred years reaches into the past, the present and the future.

8. In addition, the District Court, Eastern District of Virginia, Norfolk Division, has intentionally, and system-

atically engaged in, and is continuing to engage in practices in the administration of Civil justice that deprives petitioner of his rights under the 5th, 13th, 14th, and 15th amendments of the U.S. Constitution, thereby continually denying petitioner promotions, injunctive relief, due process, equal protection, equal employment opportunity and human dignity.

9. This case goes beyond the limited issue of promotion to Education Specialist GS 1710-12 to certain inextricably interwoven inherent rights of the petitioner as alleged in the pro se complaint of February 80. It also involves the inextricably interwoven questions whether a District Court with a judge who displays the confederate symbol of slavery and which has never had a Black judge or perhaps racially impartial white judges, and the Army have continu-

ally, systematically and intentionally subjected petitioner to inherent violations of due process, inherently unequal protection and unequal justice in violation of the 5th, 13th, 14th and 15th amendment clauses of the U. S. Constitution, Executive Orders, laws, and regulations of the Army.

10. The display of Robert E. Lee's picture with cross confederate flags by Judge Richard B. Kellam on the wall of his chamber unlawfully in the federal District Court, tax-supported building, Eastern District of Virginia, Norfolk Division, is <u>irrefutable evidence per se</u> to this Black petitioner and to any impartial judge that he is <u>personally biased and prejudiced toward petitioner</u> and the Black race in this case of competition for promotion to GS-12 between a white and Black male for the same Civil Service position at Fort

Eustis, VA.

Judge Kellam's selection, as federal district judge, was unconstitutional; therefore petitioner has not had a constitutional trial.

> "Perhaps nowhere is the importance of judicial review better illustrated than in the testing of the very constitution itself. The (Virginia) Convention of 1901-02, after prolonged debate, decided to proclaim the constitution rather than submit it to the vote of the people for ratification. This was a doubtful policy and a break with tradition. Every constitution since that of 1776 had been voted upon by the people. But the Convention did not dare to submit for ratification by the old electorate a constitution which disfranchised part of it." (See: A History of Virginia Conventions by J. N. Brenaman. (J.LH.LL Press, Richmond /I9027 pg. 91 ft. chapter on debates. 1901-02, pp. 117-307)
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> "The primary objective in calling the Convention of 1902 was to eliminate the Negro from politics by imposing stringent suffrage qualifications."
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(A Study of Judicial Review in Virginia 1789-1928. By M. V. Nelson, Ph.D. 1949. Columbia University Press) Petitioner has been denied his constitutional rights as a citizen and as a federal government employee for many years.

xxxx

> "We may conclude by saying that the suffrage provisions of the Constitution of 1902 have resulted in eliminating the negro. The Convention did the State a great service when it removed the negro from politics and thus rendered the purification of the electorate possible." (The Virginia Constitutional Convention of 1901-1902 by Ralph C. McDaniel, Ph.D., University of Richmond, Johns Hopkins University Studies of Historical and Political Science.)

(All State imposed discrimination against the Negro race is unconstitutional denial of equal protection under the 14th amendment of the U. S. Constitution (Slaughter House cases, 16 Wall. 36 (1873) (Strauder v. West Virginia, 100 US 300, 307-308 (1879) Virginia v.

Rives 100 US 313, 318 (1879); Ex parte, Virginia, 100 US 339, 344-345 (1879) are inherently, inseparable.

11. The Confederate symbol of slavery means to the petitioner and to any impartial judge that petitioner should be in a demeaned status, segregated, humiliated; and without political rights, human dignity, employment rights in tax-supported jobs; denied due process, equal protection or equal justice; and denied injunctive relief against continuing, systematic, intentional race discrimination or be a slave.

12. The Confederate symbol of slavery speaks louder than words to this petitioner. As if spoken in court, it means also to the petitioner: "nigger," "coon" "boy," "girl," "sambo," "uncle," "auntie" "reverend," "preacher," and other demeaning, humiliating terms historically applied to petitioner and Black citizens.

The symbol is not one of love or respect.

13. The Confederate symbol of slavery is equivalent to a German Swastika flag in a court for a Jewish or French petitioner; or a U.S. flag in a confederate court during the Civil War, or to England's flag in court in the U. S. after Independence.

14. In addition to the confederate symbol of slavery, Judge Kellam's indifferent demeanor, stern attitude, unfriendly disposition toward petitioner indifference about equal employment opportunity; and his extreme friendliness and partiality toward all the white defendants, attorneys and witnesses; and obstruction of justices, is further evidence of personal bias and prejudice toward petitioner in addition to clear abuses of discretion during pre-trial and trial due to race of petitioner.

15. Moreover, the court granted defendants' attorneys two motions to extend time from November 6, 1980 to December 2, 1980 to allow attorney, Peter Lowenberg, time to go on his honeymoon. (App. H, I, J, and K.) and from October 17, 1980 to October 31, 1980 to reply to petitioner's motion to compile answers, to produce documents and for further admission; however he denied petitioner all motions for continuance for time to seek and orient another attorney or to dismiss the case without prejudice or cost to either party. There was no urgent or compelling reason to deny petitioner's motions, except race, bias and prejudice. This is clear abuse of discretion, bias and prejudice.

16. The judge's bias and prejudiced decision deliberately and intentionally diluted petitioner's trial transcript to help defendant. He ignored the prima

facie evidence of race discrimination presented in spite of his biased restriction, obstruction of justice and clear abuse of discretion. His opinion and order is saturated with bias and prejudice.

17. The American Heritage Dictionary of the English Language (1976) defines prejudice as "preconceived preference of idea: bias...hatred of a particular group, race, or religion."

18. Black's Law Dictionary defines bias as: "condition of mind...a judge unable to exercise his functions impartially in a particular case." (Evans v Superior Court in and for Los Angeles County, 107 Cal. App 372, 290 p. 662, 665. Maddox v State 32, Ga 587, 79 Am. Dec. 307; Pierson v State app. 558) to incline to one side. (Yarborough v Mallory 225 Ala. 579, 144, So, 447, 448)

19. Prejudice in Black Law Dictionary is defined as: "Forejudgement, bias, preconceived opinion. A leaning towards one side of a cause for some reason other than conviction of its justice. (Tegeler v State of Oklahoma 130 p. 1164, 1167, 9 Oklahoma Cir. 138.) Taylor v F. W. Woolworth Co. 146, Kan 841, 73 2d 110 2, 1103."

20. The following is what the confederate symbol of slavery unlawfully displayed in a federal building in a judge's chambers means officially: Quoting from the Confederate State of America's (CSA) constitution:

a. Article I, Section 8 of the CSA of America advocated: "...no bill of attainder, expost facto law; or law denying or imparing the right to property in negro slaves shall be passed."

b. Article III, Section 2 of the CSA constitution advocates: "no slave...

held in service or labor in any state or territory of the confederate states... shall be discharged from such service or labor..."

c. Further: "In all such territory, the institution of Negro slavery, as it now exists in the confederate states, shall be recognized and protected by Congress and by territorial government..."

21. Petitioner did not mention the confederate symbol of slavery at pretrial or during trial <u>because of fear of additional retaliation or charge of contempt</u>; or of extreme hostility during trial; because the confederate sentiment is very strong in Virginia and at Fort Eustis, Virginia as shown by the number of confederate flags on cars, etc., and as shown in the Virginia's state legislature and U. S. senator's extreme resistance toward the 1982 extension of

the Voting Rights Act. Petitioner sincerely hoped for miraculous justice.

22. In addition, petitioner's original attorney, the U. S. Assistance Attorney, the Army's Attorney, the court reporter, the vast majority of the District Court's officials and administrative staff are all of the white race; so to whom could a pro se Black plaintiff complain about the confederate symbol of slavery and bias and prejudice of the judge? No one. Can such a federal court ever dispense impartial justice to a Black complainant?

23. However, petitioner mentioned the confederate symbol on appeal to the Fourth Circuit; inferred in transcript and complaint. Denied. Trial in District Court was held on December 2, 1980; it was a year later before petitioner became aware of right to disqualify judges under both USC 28,

Section 144 and of the recently enacted Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, effective by Congress in October 1981. (Public Law 94-458, S. 1873).

24. Petitioner's fear of being charged with contempt or of extreme hostility by Judge Kallam was well founded: in a Virginia case, an attorney L. W. Holt was charged with contempt for filing a motion that the judge was biased and asked a change in venue; the case went through state courts to the U. S. Supreme Court:

> a. U. S. Supreme Court Reports 14 L ed 2d (381 US 131)
> L. W. Holt et al., Petitioners, v Commonwealth of Virginia. 381 US 131, 14 L ed 2d 290, 85 S Ct. 1375 (No. 464)
> Argued April 27 and 28, 1965. Decided May 17, 1965.

SUMMARY

"In contempt proceedings instituted

by a judge of the Circuit Court of the City of Hopewell, Virginia, against an attorney who had represented some of the defendants in a libel suit, the attorney filed a motion requesting the trial judge to disqualify himself from trying the contempt case, and after denial of this motion, filed a motion for change of venue, alleging in both motions bias on the part of the judge. Another attorney representing the first attorney in the contempt proceeding read this motion to the judge as part of his argument urging a change of venue. Both attorneys were adjudged guilty of contempt of court, and each was fined $50. Their convictions were affirmed by the Virginia Supreme Court of Appeals. (205 Va 332, 136 SE2d 809.)

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On certiorari, the Supreme Court of the United States reversed.

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b. Another Case: U.S. Court Reports

(403 US 212)

ROBERT JOHNSON, Petitioner,

v

STATE OF MISSISSIPPI

403 US 212, 29 L Ed 2d 423, 91 S Ct 1778

(No. 5485)

Argued April 21, 1971. Decided June 7, 1971.

SUMMARY

"The petitioner, a civil rights

worker, was charged with committing an act of criminal contempt in the Circuit Court of Grenada County, Mississippi, and the judge thereof ordered his removal from the court. The petitioner was ordered to appear at a later date to show cause why he should not be held in contempt, but before that hearing was held, the petitioner filed (1) a motion in the state court asking the judge to recuse himself and charging the judge with personal prejudice against the petitioner, the civil rights organization that he represented, and the lawyers' organization defending him, and (2) a petition in a Federal District Court for removal of the contempt proceedings.

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On appeal, the Supreme Court of Mississippi affirmed the judgement of contempt but reduced the petitioner's sentence from 4 months to 1 month. (233 So 2d 116.)

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On certiorari, the United States Supreme Court reversed and remanded. (U. S. Supreme Court Reports) 403 US 212, 29 L Ed. 423. 91 S Ct 1778)

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c. Larry Little's case relates to petitioner's case:

(404) US 553)
IN THE MATTER OF LARRY LITTLE,
Petitioner
404 US 553, 30 L Ed 2d 708, 92
S Ct 659
(No. 71-244)
January 24, 1972

SUMMARY

In a District Court in Fayette County, North Carolina, the petitioner was tried for carrying a concealed weapon. Prior to trial, the petitioner moved for a continuance because his attorney had another trial engagement in a different city, but the trial judge denied the motion and proceeded with the trial, and the petitioner acted as his own attorney. In his summation following the close of the evidence, the petitioner stated that the court was biased and had prejudged the case, and that the petitioner was a political prisoner. As a result of these statements, the trial judge held the petitioner in contempt and sentenced him to 30 days in jail as summary punishment. A North Carolina Superior Court denied the petitioner's request for habeas corpus, and the North Carolina Court of Appeals and the North Carolina Supreme Court denied review by certiorari.

On certiorari, the United States Supreme Court reversed. (US Supreme Court Reports 30 L Ed

708, 92 S Ct 659, 404 US 553).

d. Virginia has historically maintained two standards of justice for Black and white men. The John Punch case of 1640 illustrates Virginia's double standard:

RE Negro John Punch, July 1640, "Whereas Hugh Gwyn hath... Brought back from Maryland three servants formerly run away...the court doth therefore order that the said three servants shall receive the punishment of whipping and to have thirty stripes apiece one called Victor, a dutchman, the other a Scotchman called James Gregory, shall first serve out their times with their master according to their indentures, and one whole year apiece after the time of their service is Expired...and after that service...to serve the colony for three whole years apiece, and that the third being a negro named John Punch shall serve his said master or his assigns for the time of his natural life here or elsewhere." Judicial Cases Concerning American Slavery and the Negro. Carnegie Inst. Wash. D. C. 1926-27 By H. T. Catteral. Petitioner has reason to believe that if he were white, he would have been promoted to GS-12 on

on the same evidence.

e. "It appears, then, that in failing to invoke (USC 28) Section 144 (Bias and prejudice) Negroes and Civil Rights Litigants have neglected a potentially useful instrument for coping with hostile judges in Southern District Courts (see generally, NOTE: Judicial Performance in the Fifth Circuit. 73 Yale Law Journal 90 (1963)."

25. Petitioner had a right to a trial by an unbiased judge:

a. "The right to a judge free from bias or prejudice is based on due process clause of the federal constitution." (US v Scivto, 101 S Ct 568) "and on the constitutional right to a fair trial." (US v Scivto 101 St Ct 568) (CORPUS JURIS SECUNDUM Vol 48A, pp. 728, Section 108 1981 edition).

b. "Generally speaking, with respect to grounds for disqualification, a litigant is

entitled to a trial before a judge who is not biased or prejudiced." US--Fransansico v Legal Aid Society of San Diego, Inc CA Cal 563-F 2d, 1324). "It has also been stated... that the belief on the part of litigant that he cannot have a fair trial is sufficient grounds for disqualification...(of a judge)." (State ex rel. Agrivaris v Chappell. App. 344 So 2d, 925) (See also Mead Corp. v Adams Extract Co. 101 S. Ct 244 and US v Grinnell Corp. R. I. 86 S Ct 1698).

26. A few details are essential to completely understand why Judge Kellam was biased and prejudiced in denying petitioner continuances or dismissal. Petitioner was recovering from an operation of September 1980. Judge Kellam and the defendant's attorneys were <u>personal witnesses</u> to the fact

that petitioner's original attorney should have voluntarily withdrawn on 19 November 1980 at pre-trial conference in chamber or not have accepted the case because he told petitioner and the judge, for the first time, that it was ethically improper for him to have accepted petitioner's case because he stated that he is an active Reserve Lieutenant Colonel in the Army's Judge Advocate General's Corps (Lawyers) and cannot "represent a civil litigant...in a private action against the Secretary of the Army." (See pg 4 pre-trial transcript dtd 19 November 1980) (See also: Virginia State Bar Formal Opinion #182; ABA Formal Opinion #342) Petitioner asked him verbally to withdraw voluntarily. He refused to withdraw voluntarily, but withdrew based on the formal request of the petitioner. Petitioner was then, by surprise, pro se, because

the judge denied petitioner's motions for continuance to find and orient another attorney. There was no compelling reason for the judge to deny the motions, except Black race of petitioner. The court had already granted the defendant's attorney Peter Lowenberg two continuancies from November 20, 1980 to December 2, 1980 to accommodate the attorney Lowenberg's honeymoon, and from October 17, 1980 to October 31, 1980 so that defendant could reply to Demands for Documents, Admissions, etc., requested by petitioner. (App. H, I, J, and K)

27. Judge Kellam's denial of continuance was traumatic because in the same court, petitioner had been required to wait four years from September 1972 to October 1976 for trial when it was to the advantage of the same court to await a Supreme Court decision against him.

(Brown v GSA 425 US, 820, 1976) (Title VII exclusive Jurisdiction) When to petitioner's advantage, motions for continuances were denied by the same court. (App. F and G)

28. Petitioner asked Judge Kellam at pre-trial whether he could appeal his denials of motions as an interlocatory motion. In substance the answer was "No, not at this time." (See pre-trial Tr pp 4 and 5)

29. Petitioner wanted a change in venue, but being pro se, the procedure and right to change venue was not and is not now clear to petitioner.

30. Therefore petitioner had been defending himself, pro se, beginning with the pro se filing of the Complaint of February 1980 due to the ethically improper issue of his original attorney who accepted the case after it was filed pro se. Between February 1980 and

November 19, 1980, petitioner's original attorney had refused to prepare petitioner's case, leaving all research, writing, etc., to petitioner. He could not answer questions asked by Judge Kellam. The case was scheduled for 2 December 1980.

31. Being fully aware of these facts, the defendants' attorneys and Judge Kellam subjected this pro se petitioner to a more stringent standard than he applied to the defendant's attorneys for continuances, and his original attorney for preparation. This is unconstitutional because standards for pro se petitioners should be less stringent. Supreme Court decision: (Francis Haines v Otto J. Kerner, former governor of Illinois et al. 404 US 519; 30 L Ed 2d 652, 92 S Ct. 594 reh. den. 405. US 948, 30 L Ed 2d 819, 92 S Ct 963) Decided January 13, 1972. The

Supreme Court reversed the Seventh Circuit in this pro se case.

32. American Law Reports. Annotated. 48 ALR at 1166 states in favor of petitioner:

> Withdrawal of plaintiff's counsel
>
> In Finch v Wallberg Dredging Co. (1955) 76 Idaho 246, 281 P2d 136, 48 ALR2d 1150, it appeared that plaintiffs' attorneys, having represented plaintiffs for some time, voluntarily withdrew three days before the date set for the trial of a complicated case; that plaintiffs thereupon immediately engaged another attorney to represent them, but, because of other immediately urgent matters, as well as the complexity of the case, this latter attorney was unable to familiarize himself with the facts and the law of the case in the short interval of time before the trial date...the trial court summarily denied plaintiffs' motion for continuance and... since he had not been able to prepare for the trial in the short time allocated, the court again denied continuance...The reviewing court held that under the circumstances the trial court should in the exercise of its discretion have granted plaintiffs' motion for a continuance, and cited in support of its holding a number of Oregon cases...

II. ARGUMENT FOR QUESTION #2

1. WHETHER APPOINTING U. S. FEDERAL DISTRICT JUDGE, RICHARD B. KELLAM, WHO DISPLAYS THE CONFEDERATE SYMBOL OF SLAVERY ON THE WALL OF HIS CHAMBER, IS ONE OF THE REASONS PETITIONER WAS DENIED PROMOTION TO GS-12, AND WAS SUBJECTED TO INHERENT VIOLATIONS OF DUE PROCESS UNDER THE 5th AND 14th AMENDMENTS AND INHERENTLY UNEQUAL PROTECTION UNDER THE 14th AND 15th AMENDMENTS OF THE U. S. CONSTITUTION.

a. Judge Richard B. Kellam was politically selected to be federal District Court judge in about August/September 1967. He was recommended by senators from Virginia. Petitioner was hired at Fort Eustis in July 1967.

b. Black citizens, including petitioner, have been subjected historically to inherent violations

of due process, unequal protection and unequal justice. For example, Virginia's constitution of 1902 was unconstitutionally proclaimed at the Constitutional Convention of 1901-02, "rather than submit it to the vote of the people for ratification (Debates 1901-02 pp 117-307; 3100. 3260 See J. N. Brenaman. A History of Virginia Conventions (J. L. Hill, Richmond 1902) (pp 91)

c. "The primary objective in calling the convention of 1902 was to eliminate the Negro from politics by imposing stringent suffrage qualifications." (A Study of Judicial Review in Virginia 1789-1928 by M. V. Nelson Ph.D. Columbia University Press, 1947).

d. Since 1902, and earlier, Black citizens have been denied or restricted the right to vote to help select more impartial senators who could, in turn, select more impartial judges who'd disperse more impartial justice in federal courts in Virginia for Black and white people.

e. The close relationship between politics and selecting judges and denial of promotion of petitioner can be seen more clearly in the authentic Article by Mr. Larry Berkson in Judicature, the Journal of American Judicature Society (May 1979, Vol 62, No 10, which follows:

"The Senate and the Selection of Federal Judges

"Members of the Constitutional Convention of 1789, after considerable discussion, decided that the President should appoint judges with the advice and consent of the Senate."

"He (the President) shall have Power, by and with the Advice and consent of the Senate, to... appoint...Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for...but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

"From the very beginning, however, U. S. senators have played a dominant role in the process.

xxxx

"Out of these political realities grew the custom of "senatorial courtesy."

xxxx

"The practice originated during the first Congress. George Washington nominated Benjamin Fishbourn to a post in the Port of Savannah and, although he had excellent qualifications, the Senate rejected the nomination as a courtesy to the two Georgia senators who favored a different individual."

xxxx

"Until the past few decades all that a senator had to do to ensure the defeat of a presidential nominee (to a post within his state) was to declare that the nominee was "personally obnoxious" or offensive to him."

NOTE: A U. S. Senator from Virginia influenced not appointing the first Black federal judge in Virginia by President J. Carter in 1979/1980.

III. ARGUMENT FOR QUESTION # 3

1. WHETHER NOT APPOINTING ANY BLACK FEDERAL DISTRICT JUDGES OR MORE IMPARTIAL WHITE JUDGES IN VIRGINIA SINCE 1789 DUE TO RACIALLY DISCRIMINATORY DENIALS OR RESTRICTIONS IN THE POLITICAL PARTICIPATION OF BLACKS IN VIRGINIA'S STATE GOVERNMENT SUBJECTED PETITIONER TO INHERENT DENIAL OF PROMOTIONS, EQUAL OPPORTUNITIES, DUE PROCESS, AND EQUAL PROTECTION UNDER THE 5th, 13th, 14th and 15th AMENDMENTS OF THE U. S. CONSTITUTION.

a. No Black judges have ever been appointed by the U. S. president with the advice and consent of the U. S. senators from Virginia due to slavery, segregation and unconstitutional denial or restriction of Black people from voting, from petit and grand jury duties and from general political participation in the state government of Virginia during the entire history of Virginia, including the colonial era; this is inherently unequal. This is one of the reasons petitioner has not been promoted to GS-12 or higher for 13 years. Black people were first brought to the English-speaking colonies in 1619 at Jamestown, Virginia. (Brown v Board of Education of Topeka, Kan US 348, 349 at 1083)

2. A white male, Dean Rene Peters, complained that he had suffered unconstitutional discrimination because Black persons had been systematically excluded

from the grand jury that indicted him and the petit jury that convicted him. Similarly, petitioner is discriminatorily not fully represented in the Federal District Court, Eastern District of Virginia by race nor sentiment nor by impartial Black or white judges, nor by subordinate officials; therefore, petitioner has been subjected to inherently unequal judicial and constitutional protection for several centuries. Black clerks, administrative workers, etc. with Norfolk federal court are a shameful token, although thousands of Blacks have been locally qualified for many years.

a. (407 US 493)

DEAN RENE PEIERS, PETITIONER,

v

C. P. KIFF, Warden

407 US 493, 33 L Ed 2d 83, 92 S Ct 2163 (No. 71-5078)

Argued February 22, 1972. Decided June 22, 1972.

SUMMARY

A state prisoner, whose burglary conviction was affirmed by the Georgia Court of Appeals (115 Ga App 743), instituted habeas corpus proceedings in the United States District Court for the Middle District of Georgia, alleging for the first time that Negroes had been systematically excluded from the grand jury that had indicted him and from the petit jury that had convicted him. The District Court denied the petition, and the United States Court of Appeals for the Fifth Circuit affirmed on the ground that because the prisoner was not himself a Negro, he had not suffered any unconstitutional discrimination and thus his conviction must stand (441 F2d 370). The Supreme Court reversed and remanded.

3. Similarly in three landmark trilogy of cases regarding exclusion of Black citizens from grand and petit juries, the Supreme Court held generally that convictions by such juries is denial of constitutional equal protection, and

that injunctive relief is available "to vindicate these interests..."Petitioner is similarly situated. (407 US 500) See also Strauder v West Virginia, 100, US 303, 308-309, 25 L Ed 604, 665, 666 (1880); Virginia v Rives, 100 US 313, 25 L Ed 667 (1880); and Ex parte Virginia, 100 US 339, 25 L Ed 676 (1880). Many other courts in the U. S. have made favorable decisions on the issue of excluding Black citizens from juries. Petitioner should have as much protection due process and justice as a person who commits crime.

IV. ARGUMENT FOR QUESTION #4

1. WHETHER THE CONTINUOUS DENIAL OF INJUNCTIVE RELIEF BY THE EASTERN DISTRICT OF VIRGINIA, BY THE CIVIL SERVICE COMMISSION AND BY THE SECRETARY OF THE ARMY, HIS AGENTS AND ASSIGNS SUBJECTED PETITIONER TO 13 YEARS CONTINUOUS, SYSTEMATIC, AND INTENTIONAL RACIAL DISCRIMINATION

AND INHERENT VIOLATIONS OF DUE PROCESS, AND EQUAL PROTECTION UNDER THE 5th AND 14th AMENDMENTS TO THE U. S. CONSTITUTION AND HELPED TO DENY PETITIONER PROMOTIONS AND TRANSFERS. (App. F and G)

a. Petitioner has been continually, intentionally and systematically denied injunctive relief from continuous, intentional systematic race discrimination by the Army, Civil Service Commission, the Equal Employment Commission and by the Federal District Court, Eastern District of Virginia between July 1967 and July 1982. (App. F and G)

b. No person in authority would take command or firm action to stop the race discrimination. Although 3 court cases were filed and an array of EEO complaints were filed, no relief was ordered. Petitioner was forced to involuntarily retire in July 1980 due to excessive discrimination. The Army, the

CSC, the EEOC are the defendants, the investigator, the judge, the jury, and decision makers in EEO complaints. Petitioner suffered because, in part, evidence gathering, investigative procedures in EEO complaints are unconstitutional in that the complainant has no right to discovery or access to investigative file, or confrontation prior to final decision based on incomplete, distorted, undocumented, omitted statements. Hearing decisions are a sham. Continuing race discrimination is not fully recognized by the Army, CSC, or EEOC. These deficiencies were noted in Alexander Gardner v Denver Company. (415 US at 36, 48-49, 56, 1974), Cox v U. S. Gypum (409 F 2nd 289, 7th Cir 1969), Boudeaux v Baton Rouge Mine Construction Co. (437 F nd 1011 (5th Cir 1971) and Ettinger v Johnson (518 F nd, 648) (3rd Cir 1975). Petitioner suffered.

c. The Army and the Court also unconstitutionally denied petitioner promotion to Equal Employment Opportunity Officer GS 301-12 twice, although Best Qualified, according to an expert witness, Mr. Earl Woods, for vacancies #73-257 in December 1973 and vacancy #74-16 in February 1974 at Fort Monroe, Virginia and denied petitioner injunctive relief against continuing, systematic, and intentional race discrimination. (See App. F and G) United Air Lines v Evans and Trial Brief of Appeal and Petition for Rehearing En Banc with the Fourth Circuit. (CA #77-1656; CA #98-72 NN) and (CA 75-45NN) for summarized violations only.

V. ARGUMENT FOR QUESTION #5

1. WHETHER THE FEDERAL DISTRICT COURT EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION OR THE FOURTH CIRCUIT SHOULD REQUIRE THE SECRETARY OF THE ARMY TO

PROMOTE PETITIONER TO EDUCATION SPECIALIST GS 1710-12 OR EQUIVALENT UNDER AUTHORITY OF SHAW v LIBRARY OF CONGRESS WITHOUT A FORMAL FINDING OF RACE DISCRIMINATION (F Supp 479, 945-950, USDC, DC). The Shaw case authorizes settlement without a formal finding of race discrimination, including back pay.

a. "The public policy favoring amicable settlement of all disputes to reduce tension between the parties and to reduce the workload of court operations with maximum force and effects in the context of employment discrimination. (United States Allegheny-Ludlum Industries, Inc. (517 F 2d, 826, 849-850 (5th Cir. 1975)."

b. An official Army Equal Employment Opportunity Investigation finding of race discrimination by defendants against petitioner, dated November 3, 1972, concludes as follows:

c. "The record reveals, however, that he (Jesse J. Johnson) was treated differently as a course writer GS-9 and based on the subleties surrounding his separation...the investigator concludes that these actions were racially motivated." Defendant continued race discrimination from the first date of reinstatement to date of involuntary retirement in July 1980.

d. As in Shaw v Library of Congress, the Fort Eustis promotion process and performance appraisals had not been validated and this caused adverse impact upon petitioner as a Black employee. Petitioner had been subjected to continuous disparate treatment as a Black employee for 10 to 13 years. The pretext of defendants at reconstruction, validation and correcting violations of the Army's own regulation was a rigged sham by defendants' witnesses who were

not qualified to make their statements or were either found guilty of race discrimination or were pending investigation, later found to be undocumented.

e. In addition, the Army has authority to promote petitioner to GS-12 due to the many violations of the Army's own regulations under non-racial authority in personnel regulation FPM 771.1 and 772, Grievance procedure (Code of Federal Reg. USC 5, Sect. 7501 et seq) and Fort Eustis Regulation TCFE 690-1, Chapter 7, Section IX, and X dated 28 May 1975 due to numerous violations of the Army's own regulations, which was cause, in part, for denial of petitioner's promotion. (See Expert Witness, Mrs. Clark's, affidavit App. E)

VI. ARGUMENT FOR QUESTION #6

1. The opinions and order of the 1980 (and 1976) court below have decided a question relating to promotion of a

Black federal employee in a way in which it conflicts with applicable decisions of this court in the midst of bias and prejudice of the court and the Army. (App. F and G)

2. Under the McDonald Douglas Corporation v. Green Standard (411 US 792 802, e 93S. Ct. 1817, 1824 (1973), petitioner proved that he belongs to the Black racial minority (age 62 at the time of application); that he applied and was Best Qualified with job-related civilian and military training, experience, education and background; that despite being "Best Qualified" he was discriminatorily underrated by the promotion panel and rejected; for the person promoted, ratings were inflated; petitioner's were diluted due to race.

3. The position remained open and was filled by a young white male, Mr. Richard Van Deren, age about 35 at the time of application, who was less quali-

fied by job-related training, experience, and background than petitioner; and but for the promotion panel's insertion of another qualifying 171 into his promotion file during the panel's deliberations and the unlawful raising of his ratings by Mr. B. B. Thornton, the Civilian Personnel Officers (CPO), and the many Army violations of its own promotion regulations due to race, petitioner would have been rated "Best Qualified" and promoted. (Expert Witness, Mrs. Clark's affidavit App. E) (Tr. 187-243) (Expert Witness, Dr. Carrington, Tr. 129-177)

4. Defendants and the court deliberately neglected to emphasize that the primary duty of the position is to write correspondence courses for home study so as to try to justify inflating Mr. Van Deren's ratings. Petitioner had 20 years Army service, 10 years Civil Service Course

writing experience in the position 300-76 to be filled; about 12 years personal study of correspondence study of reserve officers home study courses; six books, 14 editions, published about military history, used worldwide; and other qualifications, as stated in the Statement of the Case, prior to application. Mr. Van Deren had 1½ years Civil Service experience, no military experience, and no course writing experience. Rating his civilian background based primarily on his one quarter of ISD training in college was a pretext and was used to "screen out" petitioner unlawfully (App. E, Expert Witness). This same type denial of due process and equal protection, denial of Trial De Novo etc. occurred in the 1976 court action for promotion. (App. F and G)

5. The burden shifted to defendants to try to "articulate (or prove) some

legitimate reason for the employee's rejection." McDonald Douglas Corporation v. Green 411 US, 792, 8021 93 S. Ct. 1817, 1824 (1973), Furn Co Construction Corporation v. Waters, 438 US 567, 98 S. Ct. 2943 (1978). Generalized opinion regarding qualification of petitioner is insufficient to rebut a prima facie case (Gano v. Department of Development 16 FEP p 438, 443 (SD, Ohio 1977), especially by hostile discriminating witnesses who never evaluated petitioner's writing. Rigged statements.

6. The defendant failed miserably and dismally to articulate or prove its burden and efforts to do so were a sham. For example, defendants used Mrs. E. Throckmorton as an "expert" whose experiences, background, etc. were distorted and inflated. (App. E) She made statements without documentation. She said that Mr. Van Deren's late 171 was

an error of the Civilian Personnel officer; however, Mrs. E. Sims and Miss Hubbard, on the CPO staff, deny that they gave the panel his 171 (Agreed Exh. 5, Sub Exh O and P). She said that the so-called reconstruction based on Exhibits D-7, D-8, D-9 and D-10 was correct or harmless without any proof. Furthermore, these exhibits had been denied petitioner during discovery and were introduced by surprise over petitioner's objections. These were accepted by the court and used as a partial basis for the court's biased and prejudiced opinion and order.

7. The defendant's attorney used all retaliatory, hostile witnesses who had been found guilty of race discrimination against petitioner or who were found to have made undocumented statements or misrepresentations to aid and abet discriminating officials in the past and who had been promoted. He also took advantage of

petitioner's attorney who was denied time to read & orient himself on the case.

VII. ARGUMENT FOR QUESTION #7

1. WHETHER THE DISTRICT COURT MADE REVERSIBLE ERROR IN ACCEPTING A SURPRISE UNDOCUMENTED RIGGED ALLEGATION ABOUT NAPPING IN THE OFFICE BEFORE ADMINISTRATIVE EXHAUSTION, BY HOSTILE DISCRIMINATING WITNESSES TO DENY PETITIONER PROMOTION TO EDUCATION SPECIALIST GS 1710-12 IN VIOLATION OF PETITIONER'S RIGHTS UNDER DUE PROCESS, AND EQUAL PROTECTION UNDER THE 5th, 13th, and 14th AMENDMENTS OF THE U. S. CONSTITUTION.

2. Defendants attempt to carry its burden of proof to try to "articulate some legitimate excuse, non discriminatory reason" for petitioner's denial of promotion under McDonald Douglas vs Green standard was unconstitutional and legally a dismal failure. Defendants post trial

Brief is written to cloud the record and issue, undocumented, distorted; and based on hearsay, assumptions fabricated misrepresentations, retaliation, surprise subterfuge and hostile witnesses' statements who were found guilty of race discrimination. The courts opinion and order was based primarily on the similar violations as the post trial Brief.

3. Defendants' hostile witnesses were Mr. B. B. Thornton, Civilian Personnel Officer, Mrs. C. L. Cox, Senior Writer, Mr. Oben Johnson, former EEO officer, Fort Eustis, VA, Mrs. F. Perry, fellow writer, and LTC A. Hannum, supervisor and Mrs. M. Powers (fellow writer). Each witness made verbal, undocumented allegations without administrative exhaustion as required by Army and Civil Service Regulations. (See Fort Eustis Civilian Personnel Regulations, TCFE 690-1, Chapter 7, Section IX, and X)

Mrs. C. L. Cox and Mr. B. B. Thornton were found guilty of discrimination. Mrs. Perry was never petitioner's supervisor. LTC Hannum and Mrs. Powers were pending investigation and testified on hearsay, and numerous other fabricated distortions.

VII. ARGUMENT FOR QUESTION #8

1. HAS PETITIONER WHO WAS FORCED TO RETIRE DUE TO EXTREME NEAR-VIOLENT RACE DISCRIMINATION THE SAME RIGHTS AS A PRIVATE SECTOR EMPLOYEE FOR PUNITIVE, COMPENSATORY AND EMOTIONAL DAMAGES, BACK PAY, AND PROMOTIONS UNDER 42 USC 1981?

2. Since forced retirement, petitioner is in the private sector. In paragraph 21 of his original pro se complaint of February 80, petitioner alleged emotional and mental suffering and damages manifested physically due to extreme, continuous, systematic, near-violent and continuous race discrimination which is

not allowed under Title VII. However, Supreme Court Justice Stevens dissented; stated "...Congress intended federal employees to have the same rights available to remedy racial discrimination as employees in the private sector." Petitioner's case was unfairly delayed four years between 1972 and 1976 until Brown v. GSA was decided by the Supreme Court. Senator Williams agreed with Supreme Court Justice Stevens. (Senate Committee Report, S 2515, 92d Congress, 1st Session.

3. Brown v. GSA did not expressly decide the issue of Title VII exclusiveness but a factual situation of timely appeal (See 84 Harvard Law Review 1109-1304) and Johnson v. Railway Express Agency 421 US 454. Humphrey v. Portland Cement Co. (DC Tex 1973. 367 F. Supp. 832, 488 F. 2d 691 (5th Cir 1974),

(App. F and G).

IX. ARGUMENT FOR QUESTION #9

1. Did the judge's numerous mistatements of facts, distortions, etc. in his opinion and order and defendant's attorneys' deliberate mistatements of facts and distortions in the Post Trial Brief due to race of the petitioner violate petitioner's rights under due process and equal protection of the US Constitution so much so as to deny him promotion to GS-12? The opinion and order is without a factual base.

2. Their mistatements of facts, used as a primary basis for decision against petitioner are so numerous by the judge and the attorneys that it is impossible to list them in this brief petition. They are listed, in part, in petitioner's 30 or more page appeal brief to the Fourth Circuit Court which for brevity is not enclosed in appendix of this

petition.

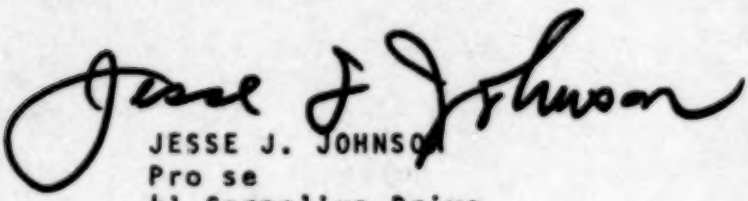
CONCLUSION

Petitioner, Jesse J. Johnson, pro se, respectfully prays that this honorable court considers the inherent and continuous injury and damages done by the Army and the court for 13 years against him in unconstitutionally denying him promotions, injunctive relief, due process and equal protection against intentional, continuous, and systematic race discrimination which resulted in emotional distress, extreme mental agony, humiliation, pain and suffering and physical damage and operations; and that for reasons set forth herein, respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be granted and that, under the honorable concept of "Equal Justice under the Law"

that the Opinion and Order of the Circuit Court and District Court be reversed so that petitioner can be promoted to Educational Specialist GS 1710-12, or equivalent position for which he is qualified, with back pay, grade and allowances and injunctive relief, or back pay and promotion to GS-12 without a formal finding of race discrimination under the Shaw v Library of Congress decision and EEOC policy, or, as an alternate remand in part and reverse in part and grant petitioner permission to amend his original complaint, if necessary, to include compensatory and punitive damages, humiliation, emotional stress, pain and suffering continually by the Army, and bias and prejudice of the court, and an order for a change of venue, preferably to a District Court in the District Court of Washington, D. C. and that this honorable court remand

this matter to the District Court for an award of attorney fees (pro se) and personal expenses.

Respectfully submitted



JESSE J. JOHNSON
Pro se
41 Cornelius Drive
Hampton, VA 23666
(804) 838-1244

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies each of this Petition for a writ of Certiorari upon counsel of record to the Respondent attorney, Michael A. Rhine, Assistant U. S. Attorney, P. O. Box 60, Norfolk, VA 23501 and Attorney Peter B. Lowenberg, HQDA DAJA-LTC Room 2D437, Pentagon, Washington, D. C. 20310 by depositing same as certified mail in a United States post office with first class postage prepaid as set forth above on or before September 25, 1982.

JESSE O. JOHNSON
Pro se
41 Cornelius Drive
Hampton, VA 23666
(804) 838-1244

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 13, 1982

Mr. Jesse J. Johnson
41 Cornelius Drive
Hampton, VA 23666

APPENDIX A

RE: Jesse J. Johnson v. Clifford Alexander, Jr., etc., et al.
A-139

Dear Mr. Johnson

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on August 13, 1982, signed an order extending your time to and including September 25, 1982.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

By

Katherine A. Downs
Assistant Clerk

Page A1

rjb
encl.
cc (letter only): The Honorable Rex E. Lee
William K. Slate, II, Esq.,
Clerk, U.S. Court of Appeals,
Fourth Circuit (your no.81-1239)

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-139 APPENDIX B

JESSE J. JOHNSON,
Petitioner,

v.

CLIFFORD ALEXANDER, JR., ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1982.

/s/ Warren E. Burger
Chief Justice of the
United States.

Dated this 13th day of August 1982.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 81-1239

Jesse J. Johnson, Appellant,

versus

Clifford Alexander, Jr., in his official capacity as Secretary of the Army, et al, Appellees.

O R D E R

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Phillips and Judge Murnaghan.

For the Court,

FILED

/s/ William K. Slate, II
Clerk

May 28, 1982
U. S. Court of
Appeals, Fourth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1239

Jesse J. Johnson, Appellant,

v

Clifford Alexander, Jr.,
in his official capacity as
Secretary of the Army;
The United States Department
of the Army, and his agents,
assigns and successors in office,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Submitted: November 16, 1981 Decided:
April 20, 1982

Before HALL, PHILLIPS and MURNAGHAN, Circuit Judges.

Jesse J. Johnson, Appellant Pro Se.
Michael A. Rhine, Peter B. Loewenberg, and John S. Albanese, for the Appellees.

PER CURIAM: APPENDIX D (COnt)

A review of the record and the district court's opinion discloses that this appeal from that Court's order dismissing the plaintiff's complaint is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. Jesse J. Johnson v Clifford L. Alexander, Jr., C/A No. 80-643-N (E. D. Va., Dec. 18, 1980).

Appendix B

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RICHMOND, VIRGINIA

JESSE J. JOHNSON

Appellant

v Civil Action No. 81-1239

CLIFFORD C. ALEXANDER, JR.,

Defendant

AFFIDAVIT OF FREDA C. CLARK,

EXPERT WITNESS, IN SUPPORT OF

APPELLANT, JESSE J. JOHNSON

STATE OF VIRGINIA

COUNTY OF MADISON TO WIT:

Freda C. Clark, being first duly sworn, under oath states as follows:

That she is the Expert Witness in the above-captioned action, and makes this affidavit in support of appellant Jesse J.

Johnson in connection with his case.

I. BACKGROUND

1. I, Freda C. Clark, as Expert Witness in the case of Jesse J. Johnson v Clifford Alexander, Jr., (CA 81-1239), hereby submit these sworn statements:

2. I was unable to attend the second day of the trial in Mr. Johnson's case, 4 December 1980. I have carefully read the entire trial transcript, with exhibits. The following information clarifies my testimony on the first day of trial and is based on the trial record and exhibits.

3. By way of background information from 1950 to July 1977, I worked in the Office of the Secretary of the Army (OSA), the Pentagon, Washington, D. C. During the period from 1952 to July 1977, I served in the Office of Employment Policy and Grievance Review (OEPGR) as Assistant Director; Chief, Equal Employment Opportu-

nity (EEO) Branch; Deputy Director; and Acting Director, with primary responsibility for the Equal Employment Opportunity Program and the adjudication of Equal Employment Opportunity complaints. A summary of my education and experience was submitted to the Court. (Tr 189-190) Currently I work as a consultant, on a free lance basis, in the areas of EEO and Civilian Personnel Administration.

4. I have had extensive training and experience in the evaluation of employee qualifications. The thesis I prepared in satisfying the requirements for a Master of Arts Degree was entitled "Rating Employees by Means of Rating Scales." The thesis involved an in-depth study of this specific aspect of personnel administration. Prior to my employment in OSA, I had one year of experience as a psycho-matrician. I had seven years of experience in operating

personnel offices, the preponderance of which concerned selection and placement functions. During the period from 1952 to July 1977, I had primary responsibility for the review and final resolution of EEO complaints within the Department of the Army. Approximately 60 to 70 percent of EEO complaints concerned non-selection for appointment or promotion.

II. ANALYSIS

5. I carefully examined the Job Element Rating Sheets for each of the three positions in issue (D/E #1). My examination of the Rating Sheets disclosed numerous discrepancies which served to vitiate and nullify the validity and reliability of the promotion process. A careful study of the promotion processes which covered the positions in point shows that they did not satisfy regulatory and procedural requirements. Applicable Civil Service regulations require:

"Adequate promotion records...":

"To provide answers to questions that management or employees may raise about the promotion program in general or specific promotion actions." (FPM 335.6-1a)

In this connection, CIVIL SERVICE COMMISSION regulations specify that:

"An agency must maintain and have available...the following records..."

"A temporary record of each promotion made under each plan. This record is maintained for two years. It must contain sufficient information to allow reconstruction of the promotion action. At a minimum, the record must include the information below..."
(underscoring supplied)
(FPM 335.6-1b(3)

"Evaluation methods and system for combining evaluations to obtain final ratings"; and

"Evaluations of the candidates (including supervisory appraisals, test scores, etc.)"; (FPM 335.6-1b(3)(e) and (f)

Under Methods of evaluating candidates to identify best-qualified, the regulations state:

"(1) Once the appropriate evaluation criteria are identified, an agency must determine--

(a) The methods to be used to evaluate the candidates;
(b) The sequence in which the methods will be applied; and
(c) The way in which the results of these methods will be combined to determine the employee's final rating."
(FPM 335.6b(1)(a)-(c)

6. The evidence of record on the evaluation methods and system of combining evaluations to obtain final ratings and the evaluation of candidates is set forth in the Job Element Rating Sheets for Mr. Johnson and for Mr. Richard Van Deren and Ms. Francine Perry. The latter two candidates were selected for the three positions in question. (D/E #1) Job elements on which candidates were rated are listed on the left-hand side of the Rating Sheets under the heading of "Ability (As Needed for the Job)."

Section I of the Rating Sheets is designed to show how each candidate was rated on each of the listed elements on the basis of demonstrated ability by means of experience, education, performance, and awards, with a range in points from 1 to 4. Section II of the Rating Sheets provides for each candidate to be rated on potential for the job, if the employee had not yet shown ability by means of experience, education, and performance in the elements listed, with a range in points from zero to three. The design of the rating form is confusing in that it provides for total element points on both demonstrated ability and potential to be listed under Section II. The total scores should have been properly listed as separate columns.

7. The record does not contain sufficient information to allow recon-

struction of the promotion actions. Specifically, it is not possible to ascertain how the panels arrived at the final ratings of record. The rating processes were defective in that the Job Element Rating Sheets were prepared in an incomplete and inconsistent manner. The Rating Sheets do not show the points assigned by each panel member to each candidate under Section I (Demonstrated Ability) in the blocks under captions of experience, education, performance, and awards, or under Section II (Potential for the Job) in the blocks under the captions of experience, education, and performance. Therefore the requirement set forth in FPM 335.6-1b(3)(f) for records on the evaluation of candidates (including appraisals, test scores, etc.) was not satisfied.

8. The Rating Sheets show the total

point values and scores and the final ratings screening panels assigned to Mr. Johnson and to the candidates selected; however, they do not show the evaluation methods and system for combining evaluations to obtain final ratings as required by FPM 335.6-1b(3)(e).

9. The panels' records of the evaluation and rating processes are replete with ambiguous inconsistencies and discrepancies. A study of the panels' completed Rating Sheets shows that Mr. Johnson did not receive fair and equal consideration. On Vacancy Number 282-76, which listed five rating elements, Mr. Johnson received a rating of zero (of some value) under the caption of potential on four elements and a rating of 2 on one element based on demonstrated ability. He received a total score of 2 and a rating of "below 70" which was disqualifying. He was therefore elimi-

nated from further consideration (D/E #1). As a result, he was referred as a best qualified candidate and selected for promotion to a grade GS-1710-12 position.

10. The evidence does not explain the system the panel used for combining point value scores and for converting scores to a final rating as required by the aforecited regulation. Further, it does not explain why or how the panel assigned Mr. Johnson a rating of less than 70, which was disqualifying, when the sole responsibility of the panel was to select the best-qualified candidates from the group of candidates who should have previously been determined to be qualified.

11. The Rating Sheet for Vacancy Number 300-76 listed four rating elements. Under the caption of Demonstrated Ability, Mr. Johnson received a rating of 3 on one element and a rating of zero on three

elements. The panel erred in that the form did not provide for a zero rating under the caption of Demonstrated Ability (D/E #1).

12. The Rating Sheet for Vacancy Number 306-76 lists five elements. Under the final caption on Demonstrated Ability, Mr. Johnson received 3 points on one element and a zero rating on four elements. The panel again erred in assigning him a zero rating on demonstrated ability when the form did not provide for such rating (D/E #1).

13. Under the caption of potential for the job, which provides for points of zero through three on each element, the panel glaringly erred by assigning Ms. Perry 9 points on one element and 4 points on each of the four remaining elements. The panel gave her a total of 25 points when the possible total was only

15 points. Under the final caption of demonstrated ability, she received 4 points on each of the five elements which totaled 20; however, she received a total score of 18, and a final rating of 94+1. There is no explanation as to how the panel arrived at the final score of 18 or the rating of 94+1.

14. It is evident that responsible members of the Civilian Personnel Office staff failed in their obligation to assure that evaluation processes were appropriately conducted and recorded in accordance with the regulatory requirements. The regulations, in pertinent point, state:

> "Staffing specialists will serve as advisors to the raters, and assure that raters are trained in evaluation methods." (CPR 300 1-5h(3)

15. The panels were inconsistent in evaluating candidates' potential. They

treated Mr. Johnson in a disparate manner.

The panels gave Mr. Johnson either zero points or no points on potential for the jobs under Section II of the Rating Sheets. Conversely, the panel for Vacancy Number 306-76 gave Ms. Perry a total of 25 points under the caption related to potential for the job. The Rating Sheet for Vacancy Number 282-76 shows that Mr. Van Deren received a total score of 4 under the caption of potential (D/E #1).

16. Ms. Elizabeth Throckmorton, the Defendant's Witness, indicated that candidates' potential was not an appropriate factor for consideration in the positions in issue; however, she did not explain why the panels rated the candidates on the basis of potential and did not comment on the foregoing inconsistencies,

discrepancies, and ambiguities (Tr 612).

III. SELECTIVE PLACEMENT FACTOR

17. The job announcements for the positions in issue did not list, as a selective placement factor, training or experience in Instruction Systems Development (ISD). A selective placement factor is a qualification essential for successful performance in the position to be filled. Applicants who do not possess this qualification were screened out as disqualified. The evidence shows that lack of training or experience in ISD was applied in a manner tantamount to a selective placement or screen out factor. Applicants with no ISD experience, but who attended the three-week training course in ISD at Fort Lee, Virginia were generally referred as best qualified candidates.

18. The Rating Sheets for each of

the three jobs in issue list the elements on which candidates were rated. Each Rating Sheet lists an element on ability to communicate effectively in writing or in writing and orally. This is the only element on any one of the rating sheets which does not require knowledges, skills and abilities which can only be acquired by training or experience in ISD. It was not possible for a candidate without training and experience in ISD to receive a maximum score of more than 4 on any one of the three positions. Mr. Johnson's supervisor rated him Outstanding on oral and written communication; however, he received only two and three points on elements involving oral and written communication (P/E #1).

19. Testimony of panel members indicates that training or experience in ISD was considered highly essential for

successful performance in the position. (USACARO, Report of Investigation, Agreed Ex. 5): (Mr. Gaskins, Sub Ex. L. p. 5; Capt. Porthouse, Sub Ex. N pp. 4 and 5; Major Sabino, Sub Ex. M, pp. 10 and 11; Mrs. Foushee, Sub Ex. V, p. 12; Mr. H. Thompson, Sub Ex. U, p. 4; LTC H. Montgomery, Sub Ex. T, pp. 3-5.)

20. Applicable regulations state:

> "Evaluation procesures must--
>
> Distinguish carefully between the knowledges, skills, and abilities an employee must possess at the time of promotion and those he can easily and quickly acquire after promotion through experience or training. Failure to make this important distinction tends to place artificial limits on competition; it fosters inbreeding and restricts the effectiveness of manpower planning and career development by the agency." (FPM 335 3-6a(3)

21. The evidence indicates that the training courses in ISD, which most of the employees included on the referral

list had taken, were only three weeks in duration. (12-30 July 1976)

22. The regulations also indicate that it was improper to include ISD as a selective placement factor:

> "Requirement designed solely to eliminate the need for a brief period of training and adjustment (unless the period would be so long as to burden unreasonably the operations of the agency."

23. Mr. Johnson was not afforded an opportunity to attend a training course in ISD prior to the time of the selection process (Agreed Ex. 12). If referred and selected, he could have acquired this training in a brief period of time.

IV. IMPROPER REASSIGNMENT OF MR. VAN DEREN

24. Mr. Van Deren was illegally reassigned. Effective 5 December 1976 Mr. Van Deren was promoted to the position of Educational Specialist, GS 1710-

12 (Number 282). Effective January 1977 he was reassigned from this position to that of Educational Specialist, GS 1710-12 (Number 300), a different line of work. Applicable regulations state:

> "An agency may promote an employee or reassign him to a different line of work, or to a different geographic area, and it may transfer a present employee or reinstate a former employee of the same or another agency to a higher grade or different line of work, or to a different geographical area, only after 3 months have elapsed since the employee's non-temporary competitive appointment."
> (5 CFR 330.501)

V. FAILURE OF COMPLIANCE WITH THE DEPARTMENT'S DECISION

25. Activity officials did not comply with the Department of the Army decision in Mr. Johnson's case. The decision is set forth in a letter, dated 20 October 1978, addressed to Mr. Johnson by Mr. Joseph S. Bennett, the then

Director of Equal Employment Opportunity for the Department of the Army. The decision included the following statements:

> "I have carefully reviewed and evaluated all the information in your complaint file..."
>
> "Based on my review of the information in your complaint file I find that...During my review of your complaint file, I noted that the rating and ranking process for two of the positions in question (Announcement Number 300-76 and 306-76) was accomplished by two technical advisors and one GS-9 representative of the Civilian Personnel Office. CPR 335.3-6h (2)(b) states that "...raters will occupy positions at a level no lower than that of the position being filled, and will be capable of making informed decisions regarding criteria and qualification in the occupational field." Inasmuch as the composition of the panels for these two positions was improper, I am directing that the promotion actions for these positions be reconstructed in strict compliance with governing regulations." (Agreed Ex. 13.)

Based on my experience in preparing

and reviewing letters of decision for Mr. Bennett's signature, this directive required activity officials to reprocess the promotions actions. Specifically they were to start over and to establish a new panel to evaluate, rate, and record candidate's qualifications (Tr pp. 221-222).

Evidence submitted by Defendant's counsel in Disposition Form dated 3 November 78, states:

> "Action required by para 3 of basic letter, 20 October 78, was accomplished at the time the grievance examiner reviewed the actions." (Tr Ex. D-10)

Mr. Bennett's decision in the case was based on a review and evaluation of all the information in Mr. Johnson's complaint file. Copies of the reports of the USACARO investigator and the Complaints Examiner are included in the complaint file. There is no evidence to show that the promotion actions for the

positions in question (Vacancy Numbers 300-76 and 306-76) were reconstructed after and in compliance with Mr. Bennett's decision.

VI. UNQUALIFIED MEMBERS OF THE RANKING PANEL

26. Ms. Donna Nora Foushee, Personnel Management Specialist, GS 201-9, stated: "As a panel member, I originally got the other two panel members to meet with me in deciding the qualifications of several applicants, all of those who applied." (Report of Investigation, Agreed Ex. 5, Sub Ex. V P2). She also stated: "Each of the panel members did a rating on our own" and "there was little variance between the ratings of the three of us." (Agreed Ex. 5, Sub Ex. V, pp. 3, 5, and 8). Ms. Foushee's service on the panel was illegal in that it violated Department of the Army regulations. She was not a subject-matter specialist in

the work, the positions, and therefore was not capable of making informed decisions regarding criteria and qualifications in the occupational field. She was GS-9 grade on a ranking panel for GS-12's, in violation of CPR 335 3-6h(2)(L). The testimony of Mr. H. Thompson and LTC H. Montgomery that she did not rate or rank is pretext to cover up discriminatory violations which impacted against Mr. Johnson. Mrs. Foushee was a member of Mr. B. B. Thornton's Civilian Personnel Office staff.

27. The evidence of record does not show that LTC Horace Montgomery, Jr., who served on the panels for position vacancies 300-76 and 306-76 was a subject matter specialist or that he was capable of making informed decisions regarding criteria and qualifications in the occupational field. His background contains

no evidence of training or experience in the work involved. (Tr p. 297) He is an infantry officer. His testimony at the trial indicated that he was not knowledgeable of the work covered by the positions (Tr 297-300).

28. Thus the ranking panels of 300-76 and 306-76 had only one qualified member who was Mr. Homer Thompson, white, Educational Specialist, GS 1710-12. He knew the selectee, Mr. Richard Van Deren.

29. Ms. Elizabeth B. Throckmorton, Expert Witness for Defendant, was questioned by Defendant's Counsel regarding her relationship with me. She stated that she was familiar with me; that I worked for Mr. Bennett and that "...when Mr. Bennett's office in reviewing grievances or complaints came to the point where they were to determine the propriety of a merit promotion action or

a procedure, they send the action to my office and to me to make the determination on whether an error had occurred and what the appropriate corrective action would be."

I have no knowledge of Ms. Throckmorton's participating in the review and resolution of complaints which were decided at the OSA level.

30. In early 1972 Mr. Joseph S. Bennett was assigned to OSA in the capacity of Deputy for Civilian Personnel Policy and Director of EEO for DA. I worked under the supervision of, and served as advisor to, Mr. Bennett from early 1972 through 1 July 1977.

31. Ms. Throckmorton worked in the Office of the Director of Civilian Personnel (OCP), which was organizationally <u>located at an echelon below OSA</u>. I met Ms. Throckmorton in the spring of 1977. We were introduced by an employee

who worked under my supervision. I do not recall that I had any subsequent conversation or contact with Ms. Throckmorton until we both appeared at Mr. Johnson's trial.

32. During the period of Ms. Throckmorton's tenure in OCP, which she stated began in March 1976, (D/E 6) Mr. Bennett's office had no responsibility for the adjudication of employee grievances regarding non-selection for promotion. Employee grievances do not involve an issue of prohibited discrimination. In the early 1970's responsibility for final decision on employee grievances regarding non-selection for promotion was delegated to and vested in commanders of Major Army Commands in the United States and overseas (CPR 771). Mr. Bennett, as Director of EEO, had sole responsibility for rendering final decisions within the Department of the Army on EEO complaints.

33. As I recall, approximately three months prior to my retirement a procedure was established for referring to the Director of Civilian Personnel, for coordination, EEO complaints which required correction of personnel management deficiencies. The Director of Civilian Personnel concurred in Mr. Bennett's decision for corrective action in Mr. Johnson's case.

34. I have no knowledge of the instance Ms. Throckmorton cited in which Mr. Bennett, on her advice, revised the remedy in a case in which discrimination had been found. She cited no specific identifying information (Tr 603-604).

35. Army Regulations on EEO include the following requirements:

> "In complaints concerning non-selection for appointment or promotion, make a detailed analysis of the comparative qualifications of both complainant and the selectee(s) in

relation to the requirements for the position." (CPR 700 (C 16) 713.8-6c (1)(e), 27 June 1973)."

36. I prepared a comparative evaluation of the qualifications of Mr. Johnson and the selectees to the extent possible on the basis of inadequate records. (P/E 6) In my opinion, this comparison indicates that Mr. Johnson's qualifications, as manifested by his job-related educational achievements and military and civilian experiences, and his off-the-job speaking and writing accomplishments, equaled and exceeded the qualifications of Mr. Van Deren and Ms. Perry (Tr pp. 202-208).

Verification: I, Freda C. Clark, Expert Witness in this cause of action, declare that I have read the foregoing affidavit and know the contents of same, and state that the contents thereof are true and correct to the best of my know-

ledge, information, and belief.

Freda C. Clark

SUBSCRIBED AND SWORN TO before me, this 14th day of May 1981 in my County and State aforesaid.

My commission expires: April 1, 1985

Patricia A. Doggett
Notary Public

SEAL

2 Incl

1. DA Decoration for Meritorious Civilian Service (Freda C. Clark).
2. Transcript of Graduate Courses (Freda C. Clark).

Copy Furnished: John S. Albanese
Civilian Personnel
Litigations
Department of Army
Washington, D. C. 20310

APPENDIX F

EXTRACT FROM JOINT TRIAL (1972-1976)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

RECORD NO. 77-1656

JESSE J. JOHNSON,
Plaintiff-Appellant,

v.

ROBERT E. HAMPTON, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

BRIEF FOR APPELLANT

EXTRACT
TO LIST
A PATTERN OF DISCRIMINATION
BY THE COURT

EXTRACT

VI.

THE TRIAL COURT ABUSED ITS DISCRETION IN MANY OF ITS RULINGS

It is conceded that a determination of what constitutes judicial discretion is very difficult but in choosing which course to take, this discretion can be abused.

The Supreme Court stated that discretion must be exercised in light of the large objective of the Civil Rights Act. (Hecht v. Bowles 321, US 321, 331 (1944) (Albermarle Paper v. Moody, 422 US 405, 416) (1975).

In the instant case, to cite an example, the court ruled that appellant's expert witness, Mr. Woods, could not testify as to the many procedural and unconstitutional violations committed by the Civil Service Commission, the Army, and their agents; (T.V.I. P98, 99, 100);

however, the court allowed defendants' witnesses, Mr. D. Clos, and Mr. Oben Johnson to state their opinions as to procedures and findings of discrimination based on records not before the court; although they are not expert witnesses. (T.V.II. 289; T.V.II. 319, 320). The court also allowed Mr. Gatling, the black who was selected, to rate himself as to how qualified he is supposed to be as EEOO without verification; however, the court disregarded continuing intentional discrimination against appellant and overwhelming evidence of the qualifications of appellant.

A further example of abuse of discretion is that the court's decision to use the Brown v. G.S.A. Supreme Court decision to restrict appellant to Title VII and to January 1973 and not to use Chandler v. Roudebush to allow appellant

trial de Novo, especially in view of the fact that the four years delay between initiation of the instant action (September 1972) on the merits and actual trial in October 1976 was due in part to delaying actions by defendants. The court denied appellant trial de Novo although the same defendants were discriminating before and after the informal agreement.

In its evaluation of the evidence, the court clearly abused its discretion by making such statements as:

> "...Even had plaintiff established a prima facie case as outlined in McDonald Douglas, the court is of the opinion that plaintiff's own personnel difficulties themselves could serve to disqualify him from selection to a position requiring great powers of conciliation and compromise..."

This finding infers that, although the white defendants are the aggressive and continuing discriminators that all black

employees and appellant are at fault for this discrimination, ignoring history of nearly 400 years. The court erred in not recognizing the Army's own finding of racial discrimination involving the same defendants before and after the agreement; defendants never-ending array of unlawful discriminatory acts; the unconstitutional Civil Service complaint process; and the historic need for the 5th, 13th and 14th amendments to the constitution, Executive Orders, Civil Rights laws and various regulations to protect appellant and others from intentional discrimination. There is no evidence that appellant cannot conciliate nor compromise nor that Oben Johnson, Gatling, nor Clos can do the same. This is abuse of discretion based on assumptions. The court is penalizing appellant for defending himself against aggressive

continuing intentional discrimination. Must he suffer in silence as thousands are doing? The appellant is in court because defendants have abused discretion and authority as a cloak to cover continued racial discrimination for ten years.

The court also abused its discretion in not ruling on punitive damages and compensatory damages due to emotional distress, mental agony and racial discrimination in spite of the array of intentional discriminatorial, unconstitutional, and unlawful personnel acts of defendants for ten years, and the evidence of the expert witness, Dr. Charles F. Christian (T.V.I. P232-244)(PX 64, Psychiatric Evaluatior Report), (PX 39, P17-18), and evidence of expert witness Mr. Woods on the use of unauthorized special factors to disqualify appellant for GS-12 and unconstitutionality of

Civil Service process.

The court abused discretion when it interrupted appellant when he began to describe the racist and discriminating environment in which he had to work with defendants Lane, Lewis, Cox, and Rodriguez, Thornton, and military supervisors (T.V.I. 165, 166, 195, 196) while the court allowed defendants' witness to testify at length. (T.V.I. 282-363).

Furthermore, Mr. Clos' entire testimony was dated prior to the informal agreement (May, June 1967) and Gatling's testimony was entirely irrelevant to the issues. The primary discriminating officials (white) were not subpoenaed for a trial de Novo; however, Mr. Oben Johnson, EEOO, Gatling, EEOO, and Yuille, Director, EEOO (all black) and irrelevant to the primary issues of discrimination were subpoenaed. The

court and the administrative process shielded white defendants who discriminated under discretion by refusing to require them to testify under oath so that their demeanor could be observed.

The court rushed appellant throughout the trial to finish by 5:00 p.m. but allowed defendants time to put on evidence leisurably and tried to create the impression that the Army leans overboard to help appellant. The Army has destroyed appellant.

The court also abused discretion when it stated that the demeanor of apellant's witnesses and appellant were cause to doubt the soundness of his claim of intentional discrimination and damages. The entire administrative and court record also refutes this ruling. In fact, the demeanor of the U. S. Attorney was very intemporate in tone and was vocally

loud, abrupt, and insulting.

The appellant had no duty to prove discrimination against other blacks; this is not a class action. The tone of the decision was not impartial and was not based squarely on evidence but on assumptions and abuse of discretion.

In the U. S. Court of Appeals, Seventh Circuit, the Court did not bar appellant with Brown v. G.S.A. (U.S. of America, et al., Plaintiff-Appellant v. City of Chicago, et al., Defendants-Appellants No. 76-1113, 76-1152, 76-1205, and 76-1344 (Argued June 14, 1976) (Decided January 11, 1977), (Fed Supp. 555-540). This is a case of Black Policemen. Appellant in instant case has the same rights in court under Section 1981 as policemen have in state court as well as the Constitution and Executive orders.

Interrogatories were not properly processed by the court.

The court's summary of the facts in saying

for example, resulted in "improper treatment" instead of "discriminatory treatment"; "position had been abolished," instead of "position had been raised"; and "alleged irregularities" from February 1966, instead of "alleged irregularities and discrimination" from February 1966; and failure to mention appellant's complaint to Colonel Ben Johnson in April 1967 and the Army's finding of discrimination in November 1972 are examples of abuse of discretion by the court to slant the summary of facts in favor of the government, rather than impartiality.

The court's use of the preponderance standard of evidence required the assumption of the role of fact-weigher without hearing live testimony of white defendants nor observing their demeanor; therefore, the court abused discretion.

Discrimination is a subtle fact...if it is present anywhere in the Federal establishment, it must be promptly extinguished.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

* * * * * * * * *

APPENDIX G TO LIST APATTERN BY THE COURT

NO. 77-1656

* * * * * * * * *

JESSE J. JOHNSON, *

PLAINTIFF-APPELLANT

VS. *

ROBERT E. HAMPTON, *
ET AL.,

DEFENDANTS-APPELLEES

* * * * * * * * *

On Appeal from the United States
District Court for the
Eastern District of Virginia
Newport News Division

* * * * * * * * *

MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

* * * * * * * * *

TO THE HONORABLE COURT OF APPEALS:

The facts are adequately and fully set out in Plaintiff-Appellant's brief and reply brief. Leave to file this

motion for rehearing was granted by this Court and the deadline for filing said motion was extended to January 29, 1979.

PARTICULARIZATION OF POINTS OVERLOOKED

1. Title VII should not constitute the exclusive and preemptive remedy for federal employees under the facts of this cause.

2. The district court's finding that appellant was not discriminated against in hiring is clearly erroneous.

3. The failure of the district court to grant injunctive relief is clearly erroneous.

ARGUMENT

The trial court relied upon the holding of Brown v. General Services Administration, 425 U.S. 820 (1976) in deciding that Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive and preemptive remedy for

federal employees alleging job discrimination.

Brown, supra, should be restricted in its holding to apply only when the federal employee has untimely filed charges of discrimination and should not be determinative of the range or substance of remedies when the charge has been timely filed.

The factual basis of appellant's claim distinguishes his claim from the holding of Brown. Appellant timely filed his charge of discrimination and exhausted all administrative remedies prior to filing suit. Appellant has alleged that he has been subjected to systemic racial and/or sexual discrimination from his original application for employment at Ft. Eustis through trial. Appellant alleges that supervisors and officials of Ft. Eustis have conspired to

deprive him of his civil rights in violation of 42 U.S.C. Section 1985 and that such officials continue to conspire to deprive appellant of his civil rights.

Appellant produced evidence of the psychic injury he has sustained as a result of discriminatory treatment. Damages for psychic injury are not recoverable under Title VII, so by restricting jurisdiction to Title VII, appellant is deprived of the range of remedies available to a private employee.

Limiting the range of remedies is incongruous with the purpose and intent of Congress in expanding Title VII to include federal employment as reflected in the legislative history set out in pages 11-15 of appellant's reply brief.

II.

The greatest obstacle facing appellant is the clearly erroneous standard. This is a standard created by Rule 52 of

the Federal Rules of Civil Procedure.

Justice Reed in United States v. United States Gypsum, 10, 33 U.S. 364, (1944) discusses the clearly erroneous standard with the following comments:

> That rule (Rule 52) prescribes that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.... The findings were never conclusive however. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Appellant submits that in light of the undisputed testimony of the history of discriminatory treatment including the unlawful separation, illegal reduction-in-force, the violation of the informal agreement, the testimony of witnesses regarding systematic discrimination against black employees at Fort

Eustis and Fort Monroe, and the intellectual segregation of appellant by caucasian co-workers; the finding that the failure to even consider appellant minimally qualified when other federal installations around the country found appellant highly qualified, should leave the definite impression that a mistake has been committed.

The trial court failed to even consider the evidence of appellant's application for the first opening as Equal Employment Opportunity Officer at Ft. Monroe and confined its analysis to the second application for employment when Mr. Gatling, a black naval officer, was employed. Whether or not the trial court found plaintiff's expert witness credible with regard to appellant's qualifications is immaterial since the preponderance of testimony established that appellant made out a prima facie

showing of discrimination with regard to the first opening as EEO officer which was not rebutted by the government as required by McDonnell-Douglass Corp. v. Green, 411 U.S. 792 (1973).

III.

The failure of the trial court to grant any injunctive relief is particularly perplexing in light of the Court's finding that appellant has been mistreated and subjected to abuse by co-employees and supervisors. The trial court found that appellant's troubles stem from personality differences rather than racial or sexual bias, and abuse of Court discretion.

Justice Marshall, dissenting in University of California Regents v. Bakke, 57 L.Ed. 750 (1978) eloquently sets out the deplorable history of institutional racism in the United States. Of particu-

lar interest herein is the following description:

> The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units. It was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here...
>
> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort as achievement, meaningful equality remains a distant dream for the Negro...
>
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the main stream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

Appellant is one of those

individuals who is attempting to bring "the Negro into the mainstream of American lives." He is the product of a segregated society: appellant attended racially segregated schools, and served his country in a racially segregated military unit. Yet appellant has devoted his life since retirement toward the goal of integration. He has with pride authored numerous books on the role of Black soldiers in American history. But appellant's personal struggle for dignity and respect seems at times to be insurmountable because of the depth and intensity of the racial bigotry he faces continuously on the job. Appellant has been required since his original application for employment at Ft. Eustis to devote most of his leisure time to challenging adverse personnel actions in an attempt to secure equality.

Thus, in light of the uncontradicted

evidence set out in Argument II, the finding that the intellectual isolation of appellant from his co-workers is not an unlawful employment practice to be remedied by injunctive relief is clearly erroneous.

There is no doubt that segregating whites and Negroes in separate departments, or subjecting Black employees to disparate treatment in terms of wages, constitutes unlawful employment practices.

By isolating appellant from intellectual exchange with other writers and supervisors, appellant is subjected to disparate conditions of work.

Cutting appellant off from social and intellectual exchange promotes distrust, creates hatred and thwarps the intellectual development of not only the appellant, but his caucasian co-workers

and is reverse segregation behind separate walls in an integrated office. This is in violation of the U. S. constitution and the U. S. Supreme Court decisions.

The entire history of appellant's struggle for equality at Ft. Eustis and at Ft. Monroe, Virginia renders the findind of no discrimination as clearly erroneous and in violation of the U. S. Constitution.

Wherefore appellant prays that this motion for rehearing and suggestion of rehearing en banc be granted and that the judgement of the district court be reversed for a new trial.

Respectfully submitted

JESSE J. JOHNSON
Plaintiff-Appellant

JESSE J. JOHNSON
Pro se

CERTIFICATE OF SERVICE

I, Jesse J. Johnson, hereby certify that a true and correct copy of the foregoing has been deposited in the U. S. mail, postage prepaid on the 29th day of January 1979 to Mr. Roger T. Williams, P. O. Box 60, Norfolk, Virginia 23501.

JESSE J. JOHNSON
Pro se

APPENDIX H

COPY

CA 80-643-N

DEPARTMENT OF THE ARMY

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON, D.C. 20310

(Received September 22, 1980
Clerk U.S. District Court
Norfolk, Virginia)

Recd. September 24, 1980
Clerk U.S. District Court
Newport News, VA 19 Sep 1980
OK Meg 9-23-80

Mr. Michael Ginn
United States District Court
Post Office Building
Granby Street
Norfolk, VA 23502

This is to confirm the arrangements you made with Captain John S. Albanese, of this office, to reschedule the date of the hearing of the above-captioned case to December 2, 1980. Thank you for your help in this matter.

Sincerely,

s/
PETER B. LOWENBERG
Chief, Civilian Personnel, Litigation

cf
John M. Cloud, Esquire, 214, Executive Building
JANAF Shopping Center
Norfolk, VA 23502

A60s

APPENDIX I
COPY

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

23 October 1980
202-697-7956

DAJA-LTC

SUBJECT: Johnson v Alexander
Civil Action No. 80-643-N

Mr. Farley Power, Jr.
Clerk, U.S. District Court
Eastern District of Virginia
Norfolk Division
Norfolk, VA 23501

Dear Mr. Power:

At the pre-trial conference held in the above captioned case on Friday, October 17, 1980, I presented the enclosed motion for Extension of Time to Judge Kellam. I am forwarding this copy to you so that your files may be complete and to insure proper filing.

PETER B. LOWENBERG
Chief, Civ. Personnel
s/ Litigation
by John S. Albanese
Captain JAG C
Civilian Personnel Litigation

APPENDIX J

COPY

TO: CLERK, NORFOLK

RE: CIVIL ACTION NO. 80-643-N

JOHNSON
v
ALEXANDER et al

HEARING SET on October 31, 1980 at 3:30 p. m.

Discovery problems notified for __
plaintiff by Meg to John M. Cloud
(Johnson)
For Defendant (By Meg to Mr. Reine
(Lowenberg)
By Meg
Date 10-17-80

APPENDIX K
COPY

c/a 80-643-N

TO: CLERK NORFOLK
RE: CIVIL ACTION 80-40NN (has since been transferred to Norfolk)

JESSE J. JOHNSON
v
ALEXANDER et al

Hearing cancelled on November 6, 1980 (no jury) at 10:00 a. m.

Hearing reset on December 2, 1980, 10:00 a. m.

Trial date continued to accommodate honeymoon of P. Lowenberg. Okay

Per Judge Clarke agreement of J. Cloud Other dates remain unchanged.

NOTOFIED: For plaintiff (by Lowenberg to J. Cloud)

For defendant (by Meg to Lowenberg) by Meg.

Date 9-18-80

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NOFROLK DIVISION

JESSE J. JOHNSON,

Plaintiff,

v. CIVIL ACTION

CLIFFORD L. ALEXANDER, JR., NO. 80-643-N

Defendant.

OPINION AND ORDER

In his complaint filed herein Jesse J. Johnson alleges "discrimination in that he was rated 'qualified' rather than 'highly qualified' or 'best qualified' on plaintiff's application for Education Specialist (GS-1710-12)." Complaint ¶ 7a. He says that as a result of his rating he was not chosen for the position of a GS-12.

I.

Many facts are stipulated, including

Plaintiff is a black male who retired from the United States Army in the grade of Lieutenant Colonel sometime about 1966. He was employed in a civilian capacity from about July 1967 until July 1980 at Fort Eustis, Virginia. In January 1973, he was reinstated to his former Civil Service position pursuant to a complaint filed. He has filed several complaints of discrimination. As of October 1976, he had 20 years Army service and 9 years in Civil Service.

Sometime in 1976, he made application for promotion to Education Specialist GS-1710-12. Three GS-12 positions were advertised, namely, 282-76, 300-76 and 306-76. Other applicants included Richard Van Deren (white) and Francine Perry (black female). One element of the job rating criteria for said positions was Instruction Systems Development (ISD), used as an element for applicants

to be classified best qualified for the positions in question. Until the promotion of Francine Perry, no black had previously been promoted to the position of Education Specialist GS-1710-12 at Fort Eustis.

II.

In brief, plaintiff asserts as grounds for relief his contention he was the one best qualified for the positions in question, and that he was not given the rating of highly qualified or best qualified because of his race. To support such contentions he says that the panels chosen to rate or rank the applicants were improperly constituted, that blacks had not been chosen to attend the ISD courses, and so on.

Although plaintiff alleged discrimination against him because of race and sex, at trial he advised he wished to

drop the sex discrimination charge. One applicant chosen over plaintiff was a white male; the other a black female. Each of them were rated as better qualified than plaintiff. The question then posed is whether there was any act of discrimination in the selection of the rating panels or in the action of the rating panels, or the selecting officer. Whether plaintiff agrees or not, once the list has been prepared showing one candidate qualified and the others highly qualified or best qualified, one could hardly suggest that discrimination occurred because the ones highly qualified or best qualified were chosen over the one rated only qualified.

III.

Plaintiff has the duty to make out a prima facie case before defendant is required to counter with evidence of a legitimate or non-discriminatory reason

for the action taken. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S,Ct. 1817, 1824 (1973); Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). The burden which may be shifted to defendant "is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race" and to "dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate reason for the employee's rejection.' 411 U.S. at 892." Furnco Construction Corporation v. Waters, supra. Not only must a plaintiff, complaining as does the plaintiff here, show that he sought the position, but "that the applicant was qualified to fill the position, having such skills... as were necessary for performance of the

work...." Hill v. Western Electric Co., Inc., 596 F.2d 99, 104 (4th Cir. 1979). Any "Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866 (1977). In footnote 44, explaining the above quotation, the Court said-

> An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based.

IV.

Plaintiff takes a shotgun approach in this case. He testified he experienced discrimination on a daily basis in his office and in the performance of his duties. He said that after he was promoted from a GS-07 to Educational

Specialist GS-1710-11, that he was expected to do his writing without assistance. He said there was discrimination because he was not given assistance with his writing after his promotion, however, it is clear from the evidence that a person in such a grade could not expect assistance. He said he was discriminated against because the white writers did not discuss their writing with him; that blacks were referred to as grinning hyenas; that persons talked of inferiority of blacks; that some of the supervisors or writers were hesitant to cooperate with him; and that one of the supervisors refused to discuss his writings with him. As to the last assertion, he said that the supervisor suggested he take a training course which was being offered, but he did not do so. He complained that Oben Johnson, the black EEO Officer, was one of the

persons who discriminated against him and who tried to block him from reinstatement to his former position; that other black supervisors discriminated against him, including General Small[1] and black females. In fact, he said everyone discriminated against him, blacks and all. He said he had applied for 15 or 20 jobs at Fort Eustis and that he had in fact filed some 16 complaints against the Army.

Among his claims is that the ranking panel for the vacancy number 300-76, Education Specialist GS-1710-12, of September 1976, was improperly constituted. It is not contested that a person of a lower grade may not be a member of a rating panel for a position of a

[1]One of the exhibits was a statement written by plaintiff in which he said General Small had been very fair in regard to his evaluation.

higher grade. Plaintiff says Mrs. Donna Foushee, GS-9, served as a ranking panel member to fill the vacancy for the GS-12 position. However, it is clear Donna Foushee did not do rating on this panel or vote. Homer Thompson (white) and Horace Montgomery (black), who were panel members, testified that they had no recollection of Donna Foushee's doing anything except handling the papers; that her job was to advise them. Thompson and Montgomery each said they did not know plaintiff, or his race, at time of their rating of him, and that the grading was based entirely on the information at hand and the criteria to be used in rating. Montgomery, a former Lieutenant Colonel in the Army, said the rating panel worked two of three days on the ratings; that they went through the information furnished and matched up the information with the criteria, and that he and

Thompson gave the same ratings. Montgomery testified that from a review of plaintiff's file and information, plaintiff did not have the qualifications, and that he asked why Johnson's application was there, because it was clear he did not have the qualifications. He was corroborated by the testimony of Thompson, who said that no statement or discussion of race took place during the rating; and that Donna Foushee was there to advise them on their duties.

On an appeal to the Army, the Army raised the issue that Donna Foushee was not a qualified member of the panel because she was not a Grade 12, and that a procedural error had occurred as Donna Foushee should not have been named to the panel. It found no discrimination, but directed the panel be reconstituted. This was done. Upon review, it was

found that while the procedural error occurred of having Foushee on the panel, the remaining two constituted a proper panel,[2] and nothing had been done which affected Johnson. Oben Johnson, the EEO Officer, agreed this was proper and correct.

Richard Van Deren was the selectee for the position. Lieutenant Colonel Hannum was the one responsible for selecting Van Deren from the list. Because of his rating, Johnson was not on the list. After interviewing all on the list, Hannum determined Van Deren and Francine Perry were the best qualified persons and selected them. A comparison of the qualifications clearly demonstrates that Van Deren was much better qualified than plaintiff. He had an undergraduate

[2]Regulations do not prescribe how many shall be placed on a panel.

degree in English and had taught English some five years. He returned to graduate school on a fellowship to study Educational Administration and obtained his master's degree and thereafter a Ph.D in Educational Administration at Virginia Intermont, where he was responsible for Planning and Design of Planning from 1970 to 1975. From there he went to Engineering School at Fort Belvoir, where he did Research and Instructional Systems for about eleven months. He developed the plan for Training Management Institute to modernize training and was project officer to assist schools in modernizing training programs. He was at a GS-11 grade.

While it is not feasible or necessary to deal with each of plaintiff's complaints, some of them call for comment.

1. He complained everyone discriminated against him, including Oben Johnson, the EEO Officer. Johnson complained the EEO Officer would not process his complaints and did nothing for him. The evidence is to the contrary. The EEO Officer said it was his duty to try to resolve any complaint made; that if it could be done through the supervisor, it should be done that way; that some of the complaints made by Johnson were handled this way; that some of Johnson's complaints were entirely without merit, or not timely filed, or did not comply with regulations and he refused to file them.

2. Johnson complained of lack of training, and he recommended it be given him; that a selection of courses was formulated so that Johnson could attend, but Johnson refused saying it would be

an indication he was not qualified.

3. The EEO Officer said that Johnson complained that it had been more than a year since he had had a performance rating, and when it was made available, Johnson objected to it as not enough time to evaluate him.

4. The EEO Officer said that Johnson complained of the location of his desk in the working office where he was assigned and of difficulty with his supervisors and others in the office; that upon this complaint, Colonel Small recommended Johnson be assigned to another office and another supervisor; that when this was offered to Johnson, he refused it, saying let them (meaning the supervisor and others in the office) move, as he was going to stay where he was.

5. EEO Officer said after Johnson

had been reinstated in 1973, it was upon his recommendation that Johnson was promoted to a GS-11, but Johnson contends the EEO Officer would not assist him.

6. Though Johnson said others made derogatory remarks about him or blacks, he never produced a witness to corroborate his claim. On the contrary, numerous witnesses, including blacks, said such statements were not made.

7. Johnson complained that the rating panel acted improperly because it permitted information concerning Van Deren to be submitted. The facts establish that prior to the time for submitting applications for the position in question, Van Deren sent his updated information to Fort Eustis and Fort Monroe to be placed in his personnel folder. It was in the Personnel Office at Fort Eustis, but by some means had not been placed in his folder when the

folders were delivered to the rating panel. While the panel was in process of doing the ratings it became known the information was not in the folder. The Personnel Office sent the information to be put in the folder. No improper information was supplied nor any advantage given. The error was that of the Personnel Office in failing to place information timely received in the personnel folder.

8. Johnson says blacks were not allowed to participate in ISD training. The Chief of Staff of the Faculty and Development Division at Fort Eustis said that the TRI was the forerunner of ISD; that the TRI Workshop Program at Eustis did not start until November 1976; that prior to that time such training was given at Fort Lee, and that the Army only began the courses in early 1976.

Contrary to Johnson's complaints, Colonel Hannum testified that Johnson did receive the ISD training, and that all of the employees received it. He said he wanted everyone to take the course, but that Johnson was reluctant to attend. He remembered Johnson's being in class because Johnson went to sleep; that he passed the word down the line for them to jar Johnson's desk and awaken him. While Johnson says no blacks were given the training, Francine Perry (black) received her certificate showing she received the training in 1976, and it was clearly established that the early classes included blacks.

9. Though Johnson said he was qualified to fill any position at Fort Eustis, he was not supported in his evaluation of himself by a single witness, or by the record. His expert witness,

Freda Clark, who said she had agreed to assist Johnson and testify on a contingent basis--that is, she would be paid if Johnson recovered in the suit--said she made an evaluation of the qualifications of the applicants and she felt that Johnson was as well qualified as anyone. However, she never examined any of his work products or the writings which he did in his work assignments.

Johnson's work at Eustis was described thusly--

(a) Francine Perry, one of those chosen for the GS-12 position which Johnson sought, said she was a co-worker of Johnson from 1967 to about 1979; that she observed the quality of Johnson's work, as she was required to review it, and his writings were below the average; that his attendance was not the best; and she had often seen him

asleep at his desk.

(b) Johnson was observed asleep at his desk several times a week by witness Powers, who saw her supervisor wake him. She said Johnson contributed very little to the office. Lieutenant Colonel Hannum observed Johnson asleep in his class, and at his desk, because his supervisor took a picture of him.

(c) Johnson commenced his work under witness Cox. She said she was delighted when she read his summary of qualifications, but his writing was not good; there were errors in grammar, misspelling, and on one paper there were 18 comments; that his writing was below average; that she suggested he go to an English class, but he did not do so; that she had seen him asleep at his desk on more than 10 occasions; that she assisted him in every way that she could,

but that at his grade level he was supposed to be able to handle his work. She was asked by Johnson's counsel what errors had occurred and how she remembered the errors. She replied she remembered he left out a verb in a sentence, and she was shocked at it.

(d) Johnson complained that when he was reinstated in 1973, monitoring was done of him and his work. EEO Officer said it was done to assure he received proper treatment, and was not treated differently from others. This was confirmed by Thornton, the Personnel Officer who said that upon Johnson's reinstatement, it was directed he receive proper orientation, and that reports were that everything was all right.

Plaintiff's charges of discrimination are without factual support, as are his other contentions. The record is clear that there is no evidence of

discrimination in selection of the rating panels, nor is there any evidence of discrimination by the panels. The panel members were furnished with the rating criteria which they were to use and the records and information on the applicants. They were to be rated on their job related experience which met the criteria of the job they sought. As Colonel Montgomery said, they were furnished with the information on the candidates, and the qualifications required; that the information they were seeking was set forth in the folders given them. Though plaintiff says he was not given as high a rating as he felt he was entitled to, he points to no facts justifying a different rating than the one received. No one questioned his prior Army experience, or his training, or his college degrees, but the prior

training and experience did not meet the qualifying criteria for the position he sought.

Hill v. Western Electric, supra, makes it clear that an employer is "entitled to adopt selection standards based upon demonstrated ability, proper qualifications, experience and length of service to consider such things as job performance, willingness to accept responsibility and dependability." 596 F.2d 105.

The Court cannot substitute its judgment for that of the rating panels or of the selection officer. The issue here is not one of whether panels were constituted in strict compliance with regulations. The issue is, whether there was discrimination against plaintiff because of his race. Since the evidence fails to show any discrimination because

of plaintiff's race, the inquiry ends as there is no other basis for relief in this action. The complaint is therefore DISMISSED.

United States District Judge

Norfolk, Virginia

December 18, 1980.

Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-561

In the Supreme Court of the United States

OCTOBER TERM, 1982

JESSE J. JOHNSON, PETITIONER

v.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-561

JESSE J. JOHNSON, PETITIONER

v.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The judgment of the court of appeals in this civil case was entered on April 20, 1982 (Pet. App. A4), and rehearing was denied on May 28, 1982 (Pet. App. A3). The Chief Justice extended the time within which to file a petition for a writ of certiorari to September 25, 1982 (Pet. App. B). Petitioner did not obtain a further extension of time. The petition was filed on September 27, 1982.

Although petitioner has certified (Pet. 66) that he served the petition by mail "on or before September 25, 1982," he has not filed a notarized statement by a member of the Bar of this Court that would entitle him to invoke Rule 28.2 of the Rules of this Court. The petition is therefore untimely. The time limit provided in 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 82-561

In the Supreme Court of the United States

October Term, 1982

JESSE J. JOHNSON
Petitioner

vs

JOHN O. MARSH, JR.,
in his official capacity as Secretary of the Army;
The United States Department of the Army,
and his agents, assigns and successors in office.
Respondents

PETITIONER'S REPLY BRIEF OPPOSING THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

JESSE J. JOHNSON
41 Cornelius Drive
Hampton, VA 23666
804-838-1244
PETITIONER, PRO SE

No. 82-561
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JESSE J. JOHNSON, PETITIONER

v.

JOHN O. MARSH, JR.,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY, THE DEPARTMENT OF THE ARMY, HIS AGENTS, ASSIGNS AND SUCCESSORS IN OFFICE, RESPONDENTS

PETITIONER'S REPLY BRIEF OPPOSING THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

JESSE J. JOHNSON
41 Cornelius Drive
HAMPTON, VA 23666
804 838 1244
PETITIONER, PRO SE

1. The judgement of the Court of Appeals in this civil case was entered on 20 April 1982 (PA 4), and renearing was denied on May 28, 1982 (PA 3). The Chief Justice extended time to September 25, 1982 (PA 2). The pro se petitioner timely filed his Writ of Certiorari on Thursday, 23 September 1982 in the Post Office by certified mail, in accordance with his experience of 13 years in filing complaints and lower court cases and his interpretation of the Supreme Court Rules.(PA 63)

2. The issue is not jurisdictional in 28 USC 2101(C) but compliance with the Rules of the Supreme Court for a pro se petitioner's first Supreme Court case. The issue of the Supreme Court Rule 28.2 has never been addressed by the Supreme Court as to pro se petitioners in regards to a notarized statement by a member of the Bar of this court.

3. Respondents' Memorandum for the Respondents was untimely filed deliberately on 9 November 1982 and coordinated with the transfer of petitioner's case to the Court Conference on November 10, 1982 for consideration on 24 November 1982 and for announcement on 29 November 1982. Such delays are unconstitutional and deny petitioner adequate time and notice to research and prepare his Reply Brief in response to written contentions in court against him in the highest court in the country. Petitioner cannot understand why his case was sent so hurriedly to the Court Conference without notice.

4. Respondent should have filed his memorandum on or before 27 November 1982, 30 days after docketing, or have applied for extension of time with notice to petitioner. Respondents, knowing the

rules and the law, have no more rights to untimely file than petitioner. Such violations of petitioner's rights for 13 years have been coordinated against petitioner by the defendants and the lower courts. The Solicitor General continues these violations. This is the primary issue in the Supreme Court.

5. Petitioner tried until the date of mailing his petition to find an attorney to represent him, but found them refusing to accept Equal Employment Opportunity cases and complaints against judges in the Eastern District for the Federal Court in Virginia and reluctant to make suggestions or to sign anything. I do not know an attorney who would sign a notarized statement.

6. Respondents have experienced attorneys and staffs. Petitioner has none of these. There is no excuse for filing their memorandum untimely.

7. It is therefore respectfully submitted that the petition for a Writ of Certiorari by petitioner be accepted and that respondents' opposition be denied.

JESSE J. JOHNSON
Pro se
41 Cornelius Drive
Hampton, Virginia 23666
(804) 838-1244

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this petition for a Reply Brief upon counsel of record, Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530 and 40 copies to the Supreme Court Clerk by courier on or before November 23, 1982 for consideration by the Court Conference on November 24, 1982.

JESSE J. JOHNSON
Pro se Petitioner
41 Cornelius Drive
Hampton, VA 23666
(804) 838-1244

V 067 522 111

RECEIPT FOR INSURED MAIL
DOMESTIC — INTERNATIONAL

ADDRESSED FOR DELIVERY AT
(Post Office, State and Country)
petition
Wash. D.C. 20543

POSTAGE	AIR ☐	$ 5.09
INSURANCE COVERAGE		FEE
$ 50.00		$ .85
SPEC. HANDLING		¢
DOMESTIC ONLY	SPECIAL DELIVERY	$
	RESTRICTED DELIVERY	¢
RETURN RECEIPT (Except to Canada)		¢
FRAGILE ☐ LIQUID ☐ PERISHABLE ☐		TOTAL $5.94
		CUSTOMER OVER
		POSTMASTER By

PHILADELPHIA PA MAIN OFFICE SFP 28 1982

V 067 522 112

RECEIPT FOR INSURED MAIL
DOMESTIC — INTERNATIONAL

ADDRESSED FOR DELIVERY AT
(Post Office, State and Country)
petition
Norfolk Va. 23501

POSTAGE	AIR ☐	$ .86
INSURANCE COVERAGE		FEE
$ 50.00		$ .86
SPEC. HANDLING		¢
DOMESTIC ONLY	SPECIAL DELIVERY	$
	RESTRICTED DELIVERY	¢
RETURN RECEIPT (Except to Canada)		¢
FRAGILE ☐ LIQUID ☐ PERISHABLE ☐		TOTAL $1.72
		CUSTOMER OVER
		POSTMASTER By

PHILADELPHIA PA MAIN OFFICE SFP 28 1982

V 067 522 113

RECEIPT FOR INSURED MAIL
DOMESTIC — INTERNATIONAL

ADDRESSED FOR DELIVERY AT
(Post Office, State and Country)
petition
Wash. D.C. 20310

POSTAGE	AIR ☐	$ .86
INSURANCE COVERAGE		FEE
$ 50.00		$ .86
SPEC. HANDLING		¢
DOMESTIC ONLY	SPECIAL DELIVERY	$
	RESTRICTED DELIVERY	¢
RETURN RECEIPT (Except to Canada)		¢
FRAGILE ☐ LIQUID ☐ PERISHABLE ☐		TOTAL $1.72
		CUSTOMER OVER
		POSTMASTER By

PHILADELPHIA PA MAIN OFFICE SFP 28 1982

PA 63

END OF DOCKET